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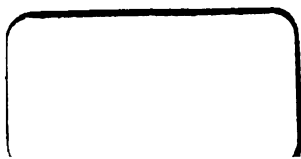
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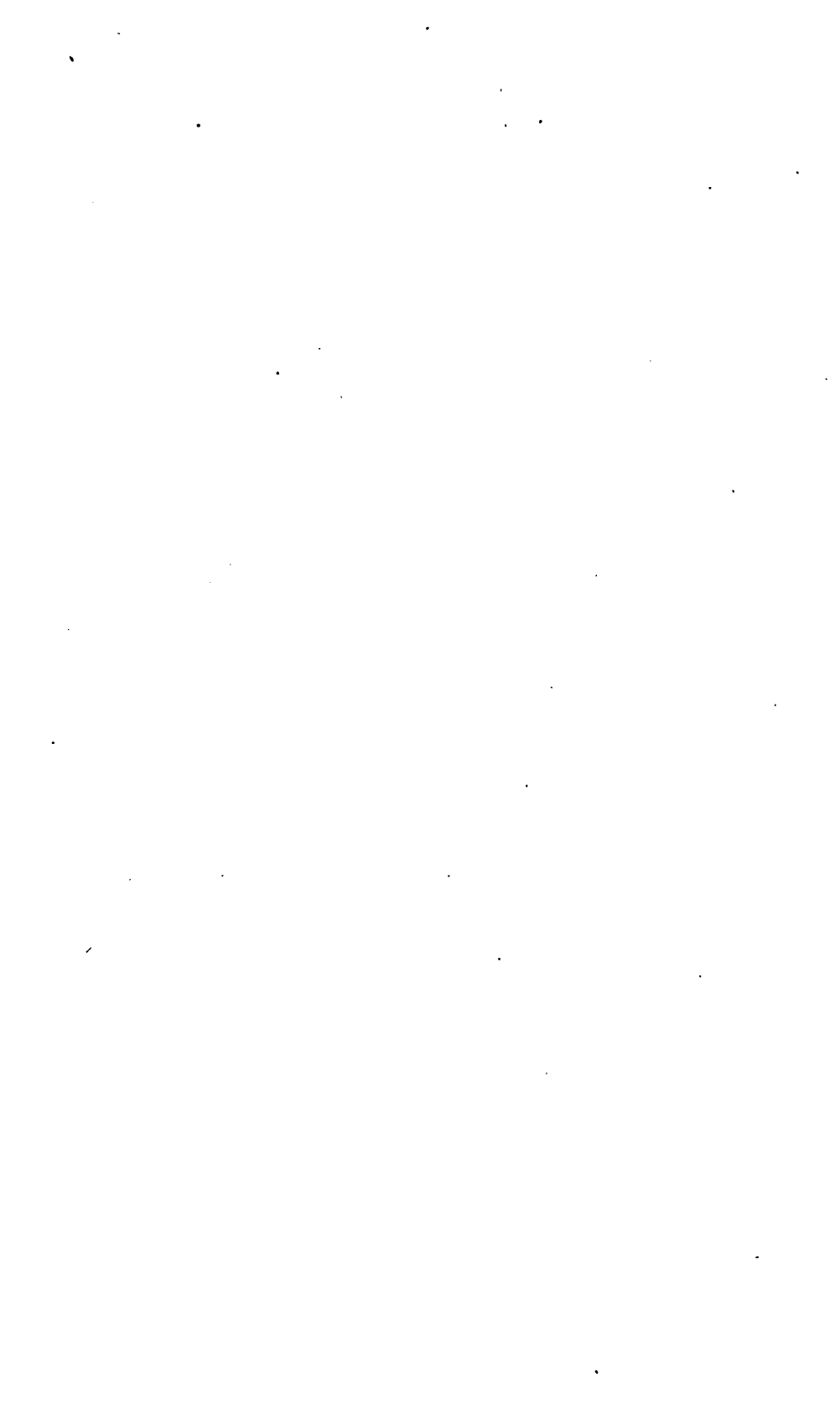
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JSN

JAC

HTK





J. Hills

CASES

ARGUED AND DECREED

IN THE

HIGH COURT OF CHANCERY.

Ut dicere laeso
Jus populo possint, Injustitiæque mederi.

From the Second London Edition, carefully corrected from the many gross errors of the former impression. To which are also added proper References to the Ancient and Modern Books of the Law.

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TO THE READER.

PIECES of this nature, how indifferent soever, have never yet missed a favourable acceptance : the very want and matter of them made them welcome to the world, in spite of all the disadvantages of a *blunder'd composition*, infinitely below the dignity of *Chancery*, and short of that excellent language and reason with which cases are daily debated and decreed there. It is, doubtless, for the honour of this noble Court its proceedings should be known, as well as the interest of mankind to be instructed how they may be relieved against the trepans of deceit and fraud in the great sanctuary of plain-dealing and honesty. This, I hope, will make the usefulness of the present publication unquestionable, which is here offered to the world without encomiums and flourishes from the approbation of great men, or comparison with meaner books of this kind. If it be really the best undertaking of this nature yet extant, the reader will easily discern it ; and 'tis more reasonable he should take the character from the book itself, than from the preface.

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DE TERM. SANCT. TRIN.

Anno Regis 12 Car. II.

IN CANCELLARIA.

Chief Justice FOSTER, in absence of the CHANCELLOR.

Copleston against Borwill.

The plaintiff made an absolute conveyance in fee to the defendant, by lease and release, of lands worth 1000*l.* per annum, in consideration of 1000*l.* The plaintiff at the making the conveyance had but the reversion in fee expectant on an old life, which shortly after died; the plaintiff then made livery to the defendant. The bill was, that the said conveyance was a mortgage, and that he might be admitted to redeem. The proof was, that the defendant had said several times after the conveyance, that he knew not how long he should enjoy the said lands; and hath said also, that he would take his money again with damages. This was strongly urged by the plaintiff's counsel to be a mortgage.

[2]

Churchil, of the defendant's counsel, insisted, that it is a maxim, that none can come to redeem a mortgage when the mortgage cannot compel the payment of the mortgage-money; for the remedy ought to be reciprocal: and in this case the defendant hath no remedy to enforce the payment of this money. And moreover he insisted, that if it were a mortgage, it must be so *à principio* either by a condition in the deed itself, or by another collateral deed made at the same time; for the condition ought to be made and conceived at the same time with the conveyance. And in the principal case it was not said that it was a mortgage at first, but by agreement subsequent; and then he said, that was a nude agreement, and no manner of execution of it.

Remedy for the mortgagee and Mortgagee cannot be reciprocal.

A parole agreement after conveyance cannot be a mortgage, if not so at first.

The matter, by consent, was referred to be determined in an amicable way.

The LORD CHANCELLOR.
Chief Justice FOSTER.

Katharine Venables against Foyle.

Rep. Chanc.
Part. 1. 188.
Assignment of
a mortgage,
the mortgagee
ordered to ac-
count before
assignment,
and after it.

Katharine Venables, being a tenant to Winchester College of the Rectory of Andover, and indebted 700*l.* to the defendant, agreed with him, that he should pay 400*l.* to the college for her, and that he should surrender her lease, and take a new one in his name; and it was also agreed, that she should for the first year of the new lease hold the premises, and pay the college their rent; and if she did at the first year's end pay the defendant his 1100*l.* with damages, the defendant should assign to the plaintiff. The first year effluxeth, and the plaintiff neither paid the defendant his money, nor the college their rent; and at three years end she permitted the defendant to enter upon the premises, and to enjoy them. Thereupon the defendant exhibited a bill to have the plaintiff (then defendant) redeem, or be foreclosed of redemption. She answered; and her intent thereby appeared to be, that the plaintiff should satisfy himself by receipt of the profits, and not to pay him. Hereupon the then plaintiff (now defendant) assigned the said lease to Nicholas Venables, the plaintiff Katharine her son, in consideration of an account made up between them two of what was really due to the defendant on the mortgage. This assignment recited the said suit by Foyle to have Katharine redeem, and that his interest was a mortgage forfeited, and Nicholas Venables covenanted to indemnify Foyle against Katharine. This being the case, Katharine exhibited her bill to be relieved against Nicholas Venables and Foyle, setting forth the estate to Foyle to be (as it was) a mortgage, and sought to be admitted to the redemption against them both. Nicholas Venables pleaded several outlawries against her, so that she could not proceed against him. Foyle he answered fairly, that he had assigned to Nicholas Venables upon his paying him what was due, and not more. This case proceeded to an hearing against Foyle only, and in verity the case was no more, but that a mortgagee assigns his mortgage over for his due debt. But it was much insisted by the plaintiff's counsel, that there was a breach of trust in Foyle, and it was decreed that Foyle should account for all the profits both before and after the assignment, and pay the overplus above his own debt with damages to the plaintiff, and convey, and procure all claiming under him to convey to the plaintiff, free from incumbrances done by him

Outlawry
pleaded.
A mortgage
after forfeit-
ure assigns,
and is decreed
to account for
the whole
time, without
the assigner's
being a party.

A bill to en-
force to do an

and them. Afterwards Foyle, not being able to perform this decree, exhibited a bill against Katharine Venables, setting forth a fraud and practice between them, and that he was willing to account unto the time of his assignment, and to comply with the decree as far as he was able, and prayed Nicholas Venables might come to an account from the time of the assignment and recovery. Nicholas Venables exhibited a bill against his mother, claiming the original lease by a title paramount hers; and at the hearing the said causes about a year and a half after, it appeared that Nicholas Venables had a title to the lease paramount to his mother; Foyle was, upon hearing the matter, discharged of the decree against him.

act which the plaintiff was formerly decreed to procure.

Decree avoided by original bill

1 Roll. A-bridgm. 382. Z pl. 1. Post 42.

DE TERM. SANCT. HILL.

[4]

Anno Regis 13 and 14 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.

FOSTER, Chief Justice.

WINDHAM, Justice.

HALES, Chief Baron.

Henry Goring, Baronet, and others, plaintiffs,
against

Charles Bickerstaff and Elizabeth his wife, John Everfield by his Guardian Dame Anne Alfred, Widow, and John Alford, by Dame Anne, his Mother and Guardian, defendants.
January 30.

Upon an appeal from a decree made by the Master of the Rolls, by the defendant Dame Anne only.

John Alford, deceased, being seized of the manor of Hams, &c. by indenture dated 1 April, 14 Car. 1. and find thereupon, settles the same to the use of himself for Life, the reversion, as to part, to the use of Frances his wife, for life, for her jointure, reversion to his first, and to his fourth son in tail, reversion to Sir Edw. Alford his brother for life, reversion to Sir Edward, and to his first and all other his sons, reversion to his own right heirs, under a proviso that it should be lawful for the said John and Sir Edward, when they

[5]

should be solely seized of the premises, or any part thereof, by virtue of any of the limitations, at their pleasures to make leases of the same, or any part thereof, for one and twenty years, under what rent they pleased. 7 July, 1643. John Alford made his will, and thereby gave his daughter Jane (the defendant Everfield's mother) 600*l.* To his daughter Elizabeth (now wife of the defendant Bickerstaff) 500*l.* to make her portion 3000*l.* and devised to her all his Messuages in White-Fryers in London, Pickhatch and Goswell-street in Middlesex, and in Wigonholt in Sussex, to her and to the heirs of her body, the reversion to Sir Edw. Alford and his heirs, provided that if Sir Edward paid Elizabeth 2500*l.* at her marriage, or at 21 years of age, which of them should first happen, the estate to her to cease, and the premises to remain to Sir Edward and his heirs, and of his said will made Frances his own wife executrix, and afterwards, pursuant to his power by the indenture of 1 April, 14 Car. I. by indenture of the first of January, 1648, did demise to the plaintiffs the greatest part of the Manor of Hams, &c. from Michaelmas then last past, for one and twenty years, under 10*s.* yearly rent, upon trust, that they should permit said John Alford during his life to take and receive the rents, issues, &c. of the said manor, and upon further trust, that after his death, Frances, his wife, should receive the rents, profits, &c. in satisfaction of her jointure, so far as the premises by any former assurance were liable thereunto, and to permit her, during her life, if the term so long continued, to receive out of the residue of the rents of the premises 120*l.* per annum, and certain fire-wood and faggots; and that the plaintiffs should pay the said Jane Everfield 50*l.* per annum during the life of her husband; and should permit the said Frances his wife, during her life, if the term so long continued, to receive the residue of the rents, during the residue of the term of one and twenty years, if she should so long live, to the intent she should pay thereout so much money towards the legacies of his will, as his personal estate should be wanting to pay, and to pay the residue to such person as the said John Alford should by his will appoint; and for want of such nomination, to receive the same to her own use.

[6] And upon further trust that the plaintiffs, after the death of Frances, during the residue of the term of one and twenty years, should permit such person and persons as the said John Alford, by any writing by him signed and sealed in the presence of two credible witnesses, or his last will, should nominate; and for want of such nomination, or after the death of the nominee, the heir of the said John Alford to take up and receive all and singular the rents of the premises: the

said John Alford, by deed the same first of January, 1648, signed and sealed in the presence of four credible witnesses, thereby reciting the said demise and trust, did nominate and appoint the eldest son of William Alford his brother to have out of the residue of the premises 50*l.* per annum during the said term, and his two younger sons 60*l.* apiece, and the said Sir Edward Alford to receive the residue of the rents and profits by the trust of the said demise limited to be paid to the said Frances, and after her death to take and receive the residue of the rents and profits during the residue of the said term to his own use. It appeared by one witness, that John Alford, three or four days before his death, which was before the trust, and the declaration of trust, did acquaint that witness that he had settled the estate in Hams well, as he thought he could, and that his brother, Sir Edward Alford, was by an agreement between them to have all his estate there after his death, and that he thereout appointed some allowance to his daughter Everfield, and declared that his daughter Elizabeth (now wife of the defendant Bickerstaff) was not to have any thing out of his estate there, for that he had otherwise provided for her. John Alford, the night or the same day the demise and declaration bore date, died without issue-male, leaving the daughters his heirs. Sir Edward Alford died intestate September, 1653. The defendant, dame Anne, his relict, had taken out Administration; Jane, the mother of the defendant, John Everfield, and whose heir he was, died in the life of Frances her mother; Frances having proved John Alford her husband's will, died in 1659, having made the defendant, Elizabeth Bickerstaff, executrix. The defendant, dame Anne, as administratrix of Sir Edward Alford, defendant; John Alford, as first son and heir of Sir Edward Alford, defendant; Bickerstaff and his wife, in her right, she being one of the co-heirs of John Alford, and Executrix of Frances, who was the Executrix of John Alford; and John Everfield, as heir to Jane, co-heir with Elizabeth Bickerstaff, claimed the benefit of the trust during the residue of the one and twenty years after Frances her death; so the plaintiffs being trustees, *ut supra*, the defendants all claiming the benefit of the trust under several titles, the bill was to have the defendants interplead, and to desire the direction of the Court to whom the trust belonged.

[7]

Upon the first hearing by the Master of the Rolls, 2d Novemb. 13 Car. II.

Inasmuch as the power referred to John Alford by the lease, is, that after the death of Frances, the trustees should permit and suffer such person and persons as he should nominate, and after the death of the nominee, his own right

heirs to receive the profits, &c. The court was of opinion, that John Alford had no power to nominate any person to receive the rents, &c. but during the life of the nominee, and no longer; for after the nominee's death, the heirs at law are nominated by the original deed, to receive, &c. And when, after by deed poll, Sir Edward Alford is appointed to receive the rents, that must be intended if he so long liveth; for the deed poll reciteth the lease, and is in pursuance of the trust therein; and that John Alford his intention in the original lease was plain, that after the death of the nominee, his own heirs should have the residue of the trust; and both the deeds being executed at one time, are to be taken as one assurance; and if he had meant the heirs, executors or administrators of Sir Edward should have the remaining part after Sir Edward, he would have named them as well as Sir Edward; and for that the interest of the term was always in the plaintiff, and never any real or legal interest in Sir Edward, but as nominee to receive the profits, he being dead, the trust to him ceaseth, and nothing passeth to his heirs or executors, but remaineth to Elizabeth, the surviving daughter, heir and executrix to John Alford, and the testimony of that one witness can be intended to relate to no other settlement but the first by deed and fine, and not the trust of the lease, which was not in being when the said John Alford had the discourse with that witness, but was made the day of his death; and that the residue of the term of one and twenty years doth belong to the heir at law of John Alford, who in a doubtful case ought to be preferred, especially when it is so consonant to John Alford's intention; and the defendant, Bickerstaff, is also his executrix and daughter, and both therefore order and decree the same accordingly; and that the rents arrear and for the future, be paid to the defendant, Bickerstaff, during the coverture between them, and after to the defendant, Elizabeth Bickerstaff, during the residue of the term.

And upon the Appeal, the question was upon the whole case, whether John Alford had power to dispose of the trust of the whole term of one and twenty years after the death of Frances; and how far he had power to dispose of it; and whether there were not a restriction by the limitation of the first deed to the heirs after the death of the nominee, that did disable his disposition thereof farther, except to his heirs; and whether John Alford had disposed the whole term or not; and which of the parties ought to have the remainder of the trust?

The counsel of the defendant, Bickerstaff, now offered farther, that John Alford had no power, after two distinct limitations to two several persons, to limit it to a third after the death of the second, because it would make an executory de-

Two Deeds of the same date touching one thing but one assurance.

Heir at law to be preferred in a doubtful case.

[8]

Executory devise.

vise upon an executory devise to tend to the entailing of a chattel, and creating a perpetuity; and that the limitation of Perpetuity. John Alford, was out of the power and trust, and not of any interest in the reversion of the term. They did all agree in one uniform opinion, that the limitation of a term to several persons in reversion one after another, if those persons were in being, and particularly named, could in no wise tend to the entail of a chattel, or creation of a perpetuity; but limiting of it to a person not in being, did; and that where any person had the trust of a possibility in remainder of a term, he had good power to declare and make a disposition of the trust of such possibility; but that the limitation of such remainder in possibility of a chattel real to the heir of the person limiting, was a void limitation, and the estate in interest did again revert to John Alford, who made that limitation; and he, having by the deed poll the same day of the lease, which was made pursuant to the power of the first settlement, limited to Sir Edward Alford the whole remaining term after the death of Frances, without any other limitation or restriction, which he might easily have done (if so intended) the same was a good limitation of it to Sir Edward, his executors and administrators; and if the power in John Alford had been defective, his interest ought to come in aid, and supply it, to make good such limitation, for otherwise there would be no disposition at all of the remaining term, and the legacies of 50 and 60% to William Alford's children would be avoided, and the interest in the remaining term might be pretended to be in the trustees, and they claim the estate discharged of the trust, there being nothing to oppose the power or intention of John Alford in limiting the whole remainder of the term to Sir Edward, but the implicated, misplaced, and mistaken expression of the lease. The whole court was clear of opinion, that the former decree was grounded upon a mistaken foundation; and that taking both deeds together, no other equitable or reasonable interpretation can be made thereof, but that according to the power, interest and intention of John Alford, who it appears by one witness, never intended the estate to whom it was decreed by the former decree, the whole remaining term in the said lease, and trust therein after the death of Frances, for the residue was well limited and appointed to Sir Edward Alford, his executors and administrators; and that the defendant, Dame Anne, is well entitled thereunto: and both order and decree, that the former order and decree be discharged; and that the plaintiffs shall come to an account for, and pay the said Dame Anne the rents and profits of the said manor which are in arrear and to grow due until the expiration of the remainder of the said term of one and twenty years, and convey to her for the residue of the term,

Limitation in reversion to several persons in being, doth not tend to the creation of a perpetuity, but otherwise if it be to a person not in being.

The trust of a possibility is assignable or declarable.

On a void limitation, the estate reverts to the limitor.

Limitation of the trust of a term to one, good to his executors.

[9]

The interest of the limitor is to supply his power, if that be defective.

if so required ; and in so doing shall be protected and saved harmless by the authority of this court. Vide Moor's Rep. 809. Torton *contra* Mollineaux. 1 Co. Rep. 156. 3 Cro. 577. 10 Co. 47, 48. 52. And, query, why the trust of a possibility in the remainder of a term is disposable over, and the possibility in interest in the reversion of a term is not assignable. Vide 8 Co. Rep. 96.

[10]

The LORD CHANCELLOR.
The MASTER OF THE ROLLS.
Chief Justice HYDE.
Justice TWISDEN.

Pollard against Greenvil.

Rep. Chanc.
Part 1. 184.

A defective ex-
e: ution of a
power made
good in equity

The plaintiff lent the Lady Greenvil 100*l.* and one Culliford, as her chief agent and friend, became bound for the same! And the lady having power to make a lease in possession for one and twenty years of her estate, makes a lease to Culliford for one and twenty years, to secure him from the debt aforesaid, and several other debts he was engaged for the said lady ; but the lease was made to commence from a time to come, which was void in law, in respect her power was but as aforesaid ; and Culliford had the possession for some time, but was afterwards ousted by force by the lady's husband ; but her husband not long afterwards dying, she enjoyed it for the remainder of the term ; and Culliford being dead, and leaving no assets, the plaintiff therefore preferred his bill here for the debt aforesaid. But for that it appeared to the court that the money was employed for his use who created the trust for payment of debts ; and she having received the profits for thirteen years, and for that the lease was not good in strictness of law, yet the court was satisfied that the same did amount to a good declaration of her power in equity to make the lease for one and twenty years in being, and that the receipts of profits was also under that power, and subject to the trust : and although the defendant did set forth by answer, that Culliford at the time of his death was indebted to her, yet the defendant was decreed to pay the debt.

DE TERM. SANC. TRIN.

Anno Regis 14 Car II.

IN CANCELLARIA.

The LORD CHANCELLOR.

Anonymous.

Upon a Demurrer after Trinity Term, 14 Car. II 1663.

The bill was barely to discover a deed. The defendant demurred, because the plaintiff had not made oath, according to the course of the court, that he had not the deed.

Serjeant Glyn for the plaintiff insisted, that the oath was not required by the course of the court in this case; and he took this difference, that when the bill allegeth the want of a deed, and seeketh to be relieved upon the matter of that deed by a decree, there such oath is necessary; but where the bill seeks no decree, but barely to have the defendant discover whether he hath such deed or not, or to have the deed produced at a trial; in that case the plaintiff ought not to be put to his oath, for it is not to be presumed the plaintiff would exhibit a bill in either of the latter cases, if he had the deed. This difference was well approved of by the Lord Chancellor, and thereupon the demurrer overruled.

Whether it be
h. veth that
the plaintiff
make oath of
the want of a
deed, where
not.

*Sir Thomas Bennet and Sir William Brownlow, Knts. plaintiffs, [12]
against*

*Mary Box, relict of Henry Box, and daughter of Ralph Allen;
Walter Stonehouse, son and heir of Elizabeth Stonehouse,
another of the daughters of Ralph Allen; George Burdet,
son and heir of Martha Burdet, another of the daughters of
Ralph Allen.*

Annq 15 Jac.—Ralph Allen purchaseth lands in his own name, and in the name of Edward Hammond, in trust for Ralph Allen and his heirs, and Hammond to take nothing thereby: but the trust is not expressed in the conveyance. William Allen, senior, did borrow 600*l.* of John Bennet, and the said William Allen, Ralph Allen, and William Allen, junior, son and heir of the said Ralph Allen, (William Allen senior being first bound in the bond) 1630, did become bound unto the said John Bennet, since deceased, for the payment of the said 600*l.* by bond of 1000*l.* wherein they bound themselves and their heirs, under whom the plaintiffs are well en-

titled to the debt in question. And one witness deposeth, that Ralph Allen was a good husband, not one that contracted any debts of his own, and believes he and William Allen, junior, were only sureties for William Allen, senior. Ralph Allen dies, and Hammond survives, and after dies; then William Allen, son and heir of Ralph Allen, dieth without issue, and the now defendants, as heirs at law, bring their bill against the heirs of Hammond, who had the estate in law, to have the lands conveyed in performance of the trust; which is decreed to them accordingly, and the lands conveyed unto them as heirs at law of Ralph Allen.

The now plaintiffs bring their action of debt at law against Henry Box, since deceased, and the now defendants as heirs of Ralph Allen. The defendants thereunto pleaded *riens per discent præter* a third part of a messuage, worth 6*l.* 13*s.* 4*d.* per annum.

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January, 1662. The now plaintiffs bring their bill in this court against the defendants, and Henry Box, the defendant's late husband, who had the lands decreed and conveyed unto them as heirs of Ralph Allen. to have them decreed as heirs, to pay the just debts of Allen, or to have the said lands made liable to pay the said debt as assets in equity.

The defendants, Box and Stonehouse, pleaded, that the said action still depended, which is a double vexation; and demur, and demand judgment, whether they, as heirs, shall be charged in equity, without any trust or agreement further than the law chargeth them.

On hearing thereof, a case was stated on the bill, plea, and demurrer; and afterwards Henry Box died. And before any bill of revivor against the defendants, it was ordered, May 12, 1653, that the defendants do answer the plaintiffs' bill; but the benefit of the plea to be considered at the hearing.

The defendants deny that they have entered into, or received any of the profits of the said lands, the same being ever since 7 Car. extended for the debts of Ralph Allen, and ever since held by Sir John Banks and his executors, and formerly before the extents were let at 500*l.* per annum. and after at 300*l.* per annum, and now but at about 400*l.* per annum, and whereout above 60*l.* is deducted for the charges of the Sea-Banks, and the rest will not pay the interest of the principal debt, as the extendors allege.

An original was filed by the plaintiffs against Henry Box and the other defendants, on the bond in question, in the common pleas, bearing teste 16 Feb. 1659.

The Defendant, Walter Stonehouse, did for 400*l.* bargain and sell his third part of the reversion in fee of the lands in question to Henry Box deceased, by deed bearing date 3*d* of

October, 1660; and the said Henry paid then to the said Walter the 400*l.* purchase money for the same, and the defendants, as they swear by their answer, had not then, or in some months after, any notice of the said original, and no notice proved; and one witness deposeth, he believeth there was no notice; for he being conversant in all Mr. Box's affairs, if there had been any notice, he should have heard of it, as he verily believes.

The defendant, George Burdet, after the other defendants were ordered to answer, put in his answer, and thereby insisted on the same matter the other defendants did by their plea and demurrer, and was on June the 9th last past, served with process *ad audiendum judicium* upon 21st June following, but appeared not at the hearing, or any for him,

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1. Question. Whether the said lands, as this case is, shall or ought to be decreed as assets in equity?

2. Or whether the plaintiffs ought to have any decree in this case against the defendants?

Chief Justice Hyde, Chief Baron Hales, and Justice Windham, were of opinion, on hearing counsel on both sides, that the lands in the said case and bill mentioned, (as the case is stated) are not, nor ought to be decreed as assets in equity, and that the plaintiffs ought not to have any decree against the defendants.

Trust lands no assets in equity, although the trust be decreed in equity.

Afterwards, in Hillary Vacation, 1664, the bill was dismissed upon the Judge's certificate, 14th November, 1664, or 1661, in a case wherein Clark was plaintiff against Sir Thomas Fanshaw.

DE TERM. SANCT. MICH.

[15]

Anno Regis 14 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.
The MASTER OF THE ROLLS.

Dr. Coldcot against Hill and others.

The case was to this purpose: Dr. Coldcot having purchased Church lands in fee under the title of the Usurper, (during the rebellion) sold the same in fee to the defendant's testator, and covenanted that he was lawfully seized, &c. The church being restored, and the estate voided, the covenantee sued the covenant, and recovered damages to the va-

Averment
against a deed.
Relief for one
who had entered
into a general war-
ranty, where
he intended
but against
himself only,
and this after
eviction.

[16]
Post. 14 2 6.
R lief against
one's own act.

lue of the purchase money. To be relieved in this, was the scope of the bill, which did suggest a surprise upon the plaintiff in getting him into that covenant, and that it was declared by Dr. Coldcot, when he sealed, and the defendant's testator, that it was intended Dr. Coldcot should not undertake any further than against himself. Upon the hearing it was proved, that the matter of the covenant upon which the judgment was had against the plaintiff, was controverted in the paper draught, and put out by the plaintiff's counsel, and in again by the defendant's counsel, with the alteration only, that whereas the covenant was that the plaintiff was lawfully seized, &c., the plaintiff's counsel put out, [lawfully] which signified nothing; for to covenant one is seized, is intended lawfully. But some proof being, that it was declared upon sealing, that the plaintiff should undertake for his own act only,

It was decreed, that the defendant should acknowledge satisfaction on the judgment, and pay costs. And a like case to this between Farrar and Farrer was heard, and decreed after the same manner, about six months before.

The LORD CHANCELLOR.
The MASTER OF THE ROLLS.
Chief Justice HIDE.

Lee against Hale. 31 January.

1. Ruled that a devise of the moiety of the personal estate to the wife, and then of divers legacies, and after of the residue to another, that the wife shall have a full moiety, if the other moiety be sufficient to pay the debts, and that the debts shall go out of the other moiety. Dyer, 164. Against which it was objected, that the husband could not bequeath any part till the debts paid, and that therefore the debts ought to be first deducted out of the whole goods. But that objection was overruled; the other moiety left being sufficient for the debts in his case.

By the devise
of the moiety.
if a personal
estate, what
passeth.

2. Ruled, that by the bequest of a moiety of the personal estate, where the testator had moneys, bonds, and a lease for years, a moiety of the lease passed. Against which it was objected, that that was not usually reckoned personal estate.

DE TERM. SANCT. HILL.

Anno Regis 14 and 15 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.

Chief Justice BRIDGMAN.

Chief Baron HALES.

The Lord Marquis of Antrim against the Duke of Buckingham. January.

The Lady Antrim, mother of the defendant, being a feme sole, and seized of a reversion after one life, settles the lands to the use of herself for life, remainder in tail, with power for her, being sole, to make leases for three lives in possession. The feme marries, and then she and her husband make leases for one and twenty years (in the life of tenant for life) to commence from the date, for payment of debts, &c. as was alleged.

1. Question. If this lease by baron and feme was good?

Bridgman. The power is not pursued; for by the marriage she hath put herself in the power of her husband; and it is the deed of her husband, and not hers. And he took a diversity between a naked power and a power which flows from an interest; for when a bare power is given to a feme by will, to sell lands, although she marry she may sell, and may sell the lands to her husband, because it was not created by herself out of any interest of her own. But where a feme upon a settlement of her own estate reserves a power which flows from an interest, that power ought to be executed by the feme sole; and if by baron and feme, it is not good. And yet he said, such power ought to be taken liberally, though formerly they were taken strictly.

[18]
Power to a feme. how it is to be executed.

2. Question. If this lease was a lease in possession, inasmuch as it commenceth at the time of the date?

For it was said, although an estate for life were before it, yet it was in possession, in relation to the estate of the reversion.

Bridgman doubted whether the lease was void in that point; but was clear it was in the other point.

Hales said, both points are worth trial and argument at law.

The Chancellor concurred with *Bridgman*, and the bill was dismissed.

Where a lease in possession out of the reversion as to the estate of the reversion.
1 Roll. Abr. 381. X. Pl. 3.
Cro. Jac 349.
2. Bals. 216.
251. Hob. 103.
2 And. 113.
164. 4 Inst. 85.
Hard. 51.

*Fuller and others against Lance and others.*Commission
of Bankrupt.

[19]

Fuller being a goldsmith in London, and being disabled, agreed with most of his creditors to assign over all his estate upon oath to several persons, in trust for the payment of his debts, as far as his estate would pay, he having such allowance for himself and family as was agreed upon; and most of the creditors signed the said agreement; but some of the persons that signed, finding that Fuller had done some act of violation of the agreement, took out a commission of bankruptcy against the said Fuller, and seized all the estate they could come by, and pretended that some of the creditors aforesaid that signed the agreement, and that were not privy to the suing out the commission, had notice in due time, though they had neglected the same, and that it was seven months from the date of the commission before the commissioners assigned. And Fuller and other the persons concerned in the first agreement, and excluded by the commission of bankruptcy, being not comprised, as aforesaid, preferred their bill against the assignees of the commission of bankruptcy, to have the agreement performed, or at least to be admitted to an equal dividend with them. But this court would give no relief therein; and the rather, for that it was made appear, that Fuller had made a sale of some of the goods he assigned to the creditors, but dismissed the bill.

Note. That where committees of a lunatic sue for any thing in the right of a lunatic, in such case the committee as well as the lunatic are made parties.

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DE TERM. PASCHÆ.

Anno Regis 15 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.
WINDHAM, Justice.

Sir Edward Heath against Henly and Whitwick. May 25.

1 Roll. Abr.
378. Pl. 4.
March 129.
Post. 26 2
Chanc. Cas.
217.

The plaintiff was son and executor of the late Chief Justice Heath, (who was made Chief Justice at Oxon during the difference between the king and parliament, but never sate as Chief Justice in Westminster Hall;) and the bill was to have an account of moneys received by the defendants, being prothonotaries of the King's Bench, which was alleged to belong to the said Chief Justice, and which moneys they

by their office ought to receive for the Chief Justice by an implied trust, *virtute officii*. The defendant pleaded the statute of limitations, 21 Jac. 16. A trust out of the statute of limitations.

Upon the arguing of this plea, it was insisted by the plaintiff's counsel, that this trust was not within the said statute. And it was answered of the other part, that a guardian was within the said statute, and he was trusted. Ordered that the defendants should answer.

The LORD CHANCELLOR.
The MASTER OF THE ROLLS.

[21]

Dorothea Dame Darcy against Chaloner Chute, Henry Haughton, and others.

The plaintiff being a widow, and seized of a jointure worth 700*l.* per annum, Mr. Chute the father made suit to marry her, and she agreeing to it, he before the marriage agreed with her by deed in writing, that it should be lawful for her, or such as she should appoint, during the coverture, to receive and dispose of the rents of her jointure as she pleased.

The deed was put in Haughton's hands, he being the plaintiff's agent formerly.

When the plaintiff and Mr. Chute married, he having first agreed with trustees of hers to settle her a jointure; and they lived together ten years, during all which time Haughton received the rents of the lady's said jointure of 700*l.* per annum, and constantly, with the approbation of the plaintiff, accounted for, and paid the same to Mr. Chute, her husband. And the plaintiff all that time never appointed Haughton to receive the rents for her, nor claimed any benefit by the agreement left in Haughton's hands; but at the ten years end Mr. Chute dying, having made the defendant his son executor, the plaintiff exhibited her bill to have an account from Haughton, and charged 1000*l.* to be resting in his hands unaccounted for, that was received in Mr. Chute her husband's life-time, and she made title to the same by the said agreement made by Mr. Chute with herself before marriage. And upon the hearing (a case being cited and urged by the defendant's counsel) the court declared the aforesaid agreement before marriage with the plaintiff herself, was immediatly by the marriage extinguished, the court would not relieve the plaintiff thereupon, but ordered the defendant Haughton to account before a master for what he received after Mr. Chute's death.

Post. 117.
1 Vent. 343.

Marriage determines an agreement made by barron with feme before marriage.

DE TERM. SANCT. TRIN.

Anno Regis 15 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.
Chief Justice HIDE.
Chief Baron Hales.

Sir Henry Bellasis and his wife, against Sir William Ermine, June 4.

Upon a Plea.

The suit was for a portion of 8000*l.* given to the plaintiff's wife. The defendant pleaded it was given her provided she did marry with the consent of A, and if not, she should have but 100*l.* per annum ; and that she married without the consent of A. Ordered that the plea stand overruled.

Where the condition annexed to the gift of a portion shall defeat the portion, and where not.
1 Mod. 308.
2 Vent. 352.
Post. 140.

And the court all declared this proviso was but *in terrorem*, to make the person careful, and it would not defeat the portion.

But it was said in the case of her marriage without the consent of A., if the party that gave the portion had limited it to another, there it had been otherwise. And in this case, the wife was not unequally married ; for the plaintiff is the heir apparent at law of the Lord Bellasis.

[23]

The LORD CHANCELLOR.

Powcey against Bowen. June 26.

A lease for more years than the lessor had power for shall be good for so many years as he had power for.

RESOLVED, That where a person hath power to lease for ten years, and he leaseth for twenty years, that the lease for twenty years shall be good for ten years of the twenty in equity. And it was said to have been so settled several times in this court.

Crispe and others, Executors of Sir Nicholas Crispe, against Blake. June 26.

In 1642, Sir Nicholas Crispe and four others, became bound to the defendant's testator in 1600*l.* for the payment of 1000*l.* and interest at six months end. Interest was paid

till 1644. In Michaelmas 1662, the defendant got judgment against Sir Nicholas Crispe, and one other of the obligors, for 1600*l*. (being the penalty.) Afterwards there was paid by them, against whom the judgment was, and the other obligors at several times to above 1600*l*. And so the bill was to have the judgment vacated, and the bond delivered up, paying so much as would make up the penalty of the judgment, and interest for the same since the judgment.

It was insisted on by the plaintiff's counsel, that when judgment was had on the bond, it remained no longer a debt on the bond, nor was interest due on the judgment; so what was paid after must be taken as paid on the judgment; and if they had brought that 1600*l*. into court at law, (and offered to pay it before execution) the court at law would have accepted it. And therefore, being willing to make up what was paid already, the full of the judgment, and damages since the judgment, ought to be relieved against the judgment.

On the defendant's part it was insisted, that there was more money due for interest on the bond, and that that was paid as well by those obligors against whom there was no judgment, as by those against whom the judgment was; and what was paid by those against whom there was no judgment, their part of what was paid in by the course of the court was to be taken as interest, there being more interest due on the bond than the money paid; and there is no equity in this case to hinder the defendant from recovering of what he can at law, there being much more in conscience due; and if what is justly due to be received by any course of law, no equity ought to hinder it, so as he do not receive more than principal, interest and costs, which the defendant offers to take on account.

It was replied by the plaintiff's counsel, that one satisfaction by any of the obligors, shall be a discharge at law for the rest; and a release to one obligor is a discharge to all the rest. And when a man takes a security by a penalty, he sets up his rest there, and makes himself judge of what he would have, and ought not to have more. And after a long debate, where the case of *Whitchcot* and *Underhil* was cited, it was ordered, that the plaintiffs do pay so much, with what was paid, as will make up the penalty of the judgment and damages at 6*l*. per cent. for the penalty and costs here and at law, and thereupon the bond to be delivered up, and the judgment vacated: but with this proviso, that if 250*l*. paid in November, 1662, were paid before the judgment entered into, and the judgment entered after of that term, and that must be taken as paid as interest, because the defendant received it on the bond, the judgment

[24]

Ant. 14 Post. 226.

He that takes a security by a penalty, ought not to have more.

Monies paid before actual entering of the judgment, is to be taken as

paid on the bond, though the judgment be of a term before the payment.

So judgment on a bond worse security than the bond only.

then not being entered, which a master is to examine ; and if he find it, to allow the same as paid on the bond for interest, and the master to take the account.

So note, that a judgment on a bond, on which there is more due than the penalty for principal and interest, is worse security than the bond only.

[25]

The LORD CHANCELLOR.

Smith against Oxenden.

Post, 30, 76.

The case was, the East India company sued their factor for an account of 12000*l.* in gold he carried hence into the East Indies. He upon his account demanded (according to the usual custom) allowance for so much paid for customs to the king in India. It was insisted, that he never paid the customs there for the gold ; so whether the factor or the principal merchant should have the benefit of the customs, was the question.

And this was referred to merchants, and two merchants certified, that by the course of merchants the factor should retain the benefit of the nonpayment of the customs ; for that if the principal freight by his nonpayment of the customs had been lost, he must have answered for it to the employer, and so run the hazard wholly. And in this case the factor, by the law in East India, had it been discovered that he had concealed the gold, and not entered it into the custom-books, was to have lost his life as a felon.

The factor shall have the benefit of customs saved, and not the employer.

Two other merchants certified, that the employer was to have the benefit of the non-payment of the customs. And upon these certificates, it was decreed that the factor should have the benefit of the customs, for it was a duty to be paid, and the employer could make no title to it against him that was in possession ; and he that hath possession hath right against all but him that hath the very right. Vide *Borr against Vandale*.

Randal against Richford. June 2.

A Witness alleged he had mistaken himself at a commission. The commission being returned, he came to London, and made oath that he was surprized. A special commission issued to re-examine the witness, which was done accordingly ; but this special commission was superseded by motion, by advice of the Master of the Rolls with the six clerks, as contrary to the course of the court.

DE TERM. SANCT. MICH.

Anno Regis 15 Car. II.

IN CANCELLARIA.

Chief Justice HIDE.

Sheldon against Weldman. October 11.

Upon a Plea.

The Bill was to have an account of money delivered by the plaintiff's father (whose executor the plaintiff was) to the defendant to compound for the plaintiff's father's estate (sequestered for delinquency) at Goldsmiths' Hall.

The defendant pleaded the statute of limitation of accounts, 21 Jac. 16. Upon arguing his plea, it was insisted by the plaintiff's counsel, that an account for moneys delivered upon a trust was not within this statute, and that it had been so ruled; and thereupon the plea was overruled, and the defendant ordered to answer.

And in Trinity vacation, 16 Car. II. the case being heard by the Lord Chancellor, Justice Twisden, and Windham, the two Judges and the Lord Chancellor declared and were of opinion, that the statute of limitations did not bar this suit, because it was on a trust that the defendant had the money for which the account was sought. But for another reason the bill was dismissed.

Money upon a trust, out of the statute of limitations. 1 Roll. Abr. 387. Pl. 4. March 129. Ant 20 2 2 Chan. cas. 217. Lord Chancellor. Justice Windham. Just. Twisden

The LORD CHANCELLOR.
Chief Justice HIDE.

[27]

Nanny against Martin. October. 15.

Baron and feme have a decree for money in the right of the wife, and then the baron dies. A question is moved, who shall have the benefit of the decree, whether the wife or the executor of the husband?

And this case being referred to Chief Justice Hide, he had given his opinion, that the benefit of the decree belongs to the wife, and that it was so in a judgment at law. And exception being taken to that certificate of the judge, he refused to hear the matter of the exception, but left it to the Chancellor; but declared his opinion was still the same. And 18th Jan. 1663. at the seal, the Lord Chancellor would not refer it back, but confirmed the judge's certificate.

Rep. Chanc. 233.

The benefit of a decree by baron and feme belongs to a feme, and not to the executor of the husband.

Chief Justice HIDE.

Gervas Scroope, an infant, against Sir Adrean Scroope.
October 15.

[28]

A bill was to be relieved touching the manor of Gidley, in Lincolnshire, and sets forth, that Gervas Scroope deceased, father of the defendant, and grandfather of the plaintiff, was seized in fee thereof, and devised the same to the plaintiff and his heirs; and that the defendant having gotten all the writings, laid claim to the same, and got into possession thereof, and did pretend that the said manor was purchased heretofore in the name of the said Sir Gervas, and him, and to their heirs, and that so Sir Gervas had no power, being joint tenant, to devise the same, whereas his, the said defendant's name was used in the said conveyance in trust for the said Sir Gervas, and the purchase was made, and the money paid by Sir Gervas; and that so the defendant's title was but as a trustee for Sir Gervas, and consequently for the plaintiff, to whom Sir Gervas had devised the same.

The defendant pleaded, that the premises were the 19th of June, 13 Car. I. by good conveyance in law well executed for 4600*l.* really and bona fide paid, conveyed by J. S. to Sir Gervas Scroope, and the defendant, and their heirs, the defendant being the son and heir apparent of Sir Gervas; and that the said 4600*l.* was raised by Sir Gervas by sale of the lauds, which were the ancient inheritance of the family, and which, if they had not been sold, had descended on the defendant; and averred, that all the courts of the said manor that were kept in Sir Gervas's life were kept in as well the defendant's name as in Sir Gervas's name; and that the said conveyance to Sir Gervas and him, was really and bona fide, without any trust for Sir Gervas or any other; and that Sir Gervas being dead, the defendant claimed the premises by survivorship, and demanded judgment.

The plaintiff did not attend, but was alleged to be out of town, and prayed it might stand for another day. But the court directing the plea to be opened, which was done, and afterwards read, declared it clearly to be a good plea, unless the plaintiff could prove an express trust; and if he could have done that, he ought to have replied; but not having replied, the plea must be taken to be true; and that albeit the purchase was made by the father in his own and his son's name, it should *prima facie* be intended an advancement for the son, and not presumed a trust, unless declared so; and that it was anciently the way to join the son in a purchase, to avoid wardship. And the case of Crisp against Prat, 1 Cro. 550. and Sir Sidney Moutague's case there, were in the de-

The father joins the son with him in the purchase, it shall not be presumed a trust in the son, unless it be expressly declared.

bate of this case urged ; and the court declared to the defendant's counsel, this being the case, that nothing could be said against the plea, and so allowed it. 17th November, 1663, the plea was re-heard, and upon argument on both sides, was allowed, with double costs.

The LORD CHANCELLOR.
The MASTER OF THE ROLLS.

[29]

Chute against the Lady Dacre. October 23.

The defendant having mistaken herself in her answer, as was alleged, having therein sworn something which was found by her afterwards to be otherwise, it was alleged by her counsel, and affidavit made by herself too for that purpose, that those matters untruly set forth were added in the margin of the draught after she had perused it, and so she was thereby surprised. And it was alleged, that no replication was filed *prout* certificate, and affidavit of notice of this motion to the other side was read. But the plaintiff making no defence, it was *ex parte*, on the defendant's motion, ordered, that she be at liberty to amend her answer in the said matters mistaken. And it was said, that like liberty had been given to amend his answer before replication, in a case between Chettle and Chettle in the Lord Coventry's time.

Liberty given the defendant to amend her answer, she being surprised therein.

At the Rolls, the MASTER OF THE ROLLS.

Manning against Burges. October 26.

A mortgage was forfeited; the mortgagor afterwards meeting the mortgagee, said, I have moneys, now I will come and redeem the mortgage. The mortgagee said to him, he would hold the mortgaged premises as long as he could ; and then when he could hold them no longer, let the devil take them if he would. And afterwards the mortgagor went to the mortgagee's house with money more than sufficient to redeem the mortgage, and tendered it there ; but it did not appear that the mortgagee was within, or that the tender was made to him ; and it was decreed a redemption, and the defendant to have no interest from the time of the tender, because of his wilfulness.

A mortgagor refusing to receive his money on tender after forfeiture, shall lose his interest from the tender.

A like case between Peckham and Legay about a year since.

The LORD CHANCELLOR.
The MASTER OF THE ROLLS.

Borr against Vandall. October 27.

Ant. 25. Post.
76.

Whether factor or employer shall have the benefit of customs stolen by the factor.

The factor had stolen the custom of divers goods, of which the bill was to have an account, and to discover whether he paid those customs or no. The defendant by answer insisted that he was not bound to answer that part of the bill, for that the plaintiff, who was the employer, was not entitled to those customs, nor any advantage whether they were paid or not. Exception being taken to this answer, the master certified the answer sufficient. Exceptions being taken to the report, the cause came now to be heard upon that; and the cause of *Smith and Oxenden*, fol. 25. was cited. But on the plaintiff's side it was insisted, that this case was not like that; for that was of customs stolen from a foreign king, and this was of customs stolen from our own king; and that it would be of evil consequence, and an encouragement to evil factors, if the court should give an opinion for them in a matter of fraud, as this was. And whereas it was insisted by the defendant's counsel, that it was the course of merchants that factors should have the benefit of customs themselves, and not the principals, because the penalty would fall on the factor, if discovered: it was declared, that could not be called a custom, being grounded upon fraud; and therefore the court ordered, that the defendant should answer whether he paid the customs or not. Vide *Smith against Oxenden*, fol. 25.

[31]

The LORD CHANCELLOR.

Rich against Jaques. October 29.

Rich was plaintiff upon a *certiorari* bill to remove a cause out of the Mayor's Court, his witnesses being out of that jurisdiction, and the bill here was for an account touching other matters. Witnesses being examined, the defendant moved for a *procedendo*, and insisted upon it, for that if the cause should be heard here, he could not be relieved, not having any bill here, being here but defendant, though plaintiff in the Mayor's Court.

Certiorari bill brought to hearing.

Whereunto the plaintiff's counsel insisted, that no *procedendo* ought to be; for that this bill containing other matters, could not be determined upon the bill in the Mayor's Court,

and that the bill could not be divided ; and that the plaintiff in the Mayor's Court might file his bill in the Mayor's Court in this court, and direct it to the Chancellor, and have the same remedy here as he could there.

Ordered, that the cause stand to be heard on the bill in this court. And after hearing, the cause was dismissed out of this court.

The LORD CHANCELLOR.

Jew against Thirkwell. October 30.

The plaintiff was lessee of divers lands, whereupon an entire rent was reserved. Afterwards the inhabitants of the town where part of the lands lay claimed right of common in part of the lands so let ; and upon a trial of their right, are found to have right of common here. Now, this being but a right of common recovered, is no eviction of the land in law, because the soil was not recovered, and so no appointment could be at law ; and therefore the bill was to have the rent apportioned in equity..

And Serjeant Maynard insisted, that such apportionment had frequently been decreed here. But in this case it appearing, that notwithstanding the right of common, the lands were worth the rent reserved, and better, the court would not decree it, but the bill was dismissed.

[32]

Apportionment of rent in equity, where it cannot be in law.

Wolestoncroft against Long. November 6.

A debtor upon bonds and simple contract makes a conveyance of lands upon trust to sell for payment of his debts. It was declared to be the constant practice, and so ruled and decreed here, that all the debts should be paid in proportion ; and that if the lands were not sufficient to pay all, all should lose in proportion. And so it is where lands are given to pay debts and legacies, they shall be paid in equal proportion, because the land is made liable to the one as well as the other by the debtor himself. But otherwise it is in case of debts on judgments, that in their own nature charge the lands.

Debts on bond and simple contract to be paid in equal proportion where lands are to be sold for payment of debts. So of debts and legacies.

The LORD CHANCELLOR.

Baker against Beaumont. November 6.

One in the Fleet for breach of a decree, for not vacating of a judgment, by judgment in a feigned action in the King's Bench gets himself turned over thither, and so had liberty to go abroad, and got the defendant in the judgment taken in execution in Exon, and on a habeas corpus he was brought hither, and re-committed to the Fleet, and confined to his chamber, and a habeas corpus with a long return for the defendant in the judgment, granted.

[33]

The LORD CHANCELLOR.

The MASTER OF THE ROLLS.

Ayre against Ayre. November 10.

The plaintiff being the widow of her husband, sued the defendant, who was his executor, to have allowance of a satisfaction for several debts of the testator's (which she, having possessed herself of his estate, has paid) the executor having gotten all the estate out of her hands. It was much controverted, whether she could be helped herein? for the executor of his own wrong shall be allowed all payments made to any but himself, yet she was not executrix of her own wrong; for where there is a rightful executor, as here, there can be no executor *de son tort*. Yet it resembled that case; and the court doubting much what to do in this case, decreed by consent of counsel, that she should be allowed for all payments that she had made which were incumbent on the executor to pay, according to the course of law; but that if she had made any payments out of order and rule that the law left the executor liable to, that such payments she should not be allowed for, if they were to the prejudice of the executors.

A widow paying just debts of her husband out of his estate in her hands, shall have allowance for the same from the executor.

IN COURT.

Sackville against Dobson. November 10.

Limitation of the trust of a term to husband and wife, and the longest liver of them, for life, and after to the eldest issue of them, none being then born; a good limitation. So the limitation to husband and wife is but one limitation; and so it was admitted by counsel, it being not controverted; for

Limitation to husband and

though the trust of a term, according to the rule in *Goring and Bickerstaff's Case*, fol. 4. may be limited to divers persons that are in being one after another, because the same is transferrable, yet it cannot be good beyond two limitations to a third person not in being: *Ergo*, the limitation to husband and wife, and longest liver of them, was admitted to be but one limitation in this case.

wife is to be accounted as one limitation in the trust of a term. Perpetuity.

The LORD CHANCELLOR.
Justice TIRREL.

[34]

More against Mayhow. November. 10.

The plaintiff's bill was to be relieved upon a trust, and charged the defendant with notice of that trust, and that he had gotten a conveyance of the lands upon which the trust was had; and that at or before his taking the said conveyance, he had notice of the said trust for the plaintiff.

The defendant by way of answer denied that he had any notice of the trust at the time of his purchase or contract, and pleaded that he was a purchaser for a valuable consideration. It was insisted the plea was not good, because he did not say what the valuable consideration was; for 5s. was a valuable consideration, but yet no equitable consideration.

Purchaser without notice

The court declared that the plea in this case was well enough.

It was farther insisted, that the plea was founded upon the answer, viz. that the defendant had no notice, &c. And that the point of notice was not well answered, in that the defendant denied notice at the time of the purchase only, and the word purchase might be understood when the contract for the purchase was made; and it might be he had no notice then, and might have notice after, before or at sealing of the conveyance; and if there was any notice before the conveyance to him executed, that should charge the defendant: and that it was so lately decreed in a cause between Sir William Wheeler and ——— and Yarraway and Nicholas, by the Lord Chancellor. And so the plea was overruled.

Hardress 160.
216. 2 Vent.
361. 2 Chanc.
cases 161.
1 Chanc. ca-
ses 39.

Notice of an
incumbrance
any time be-
fore the con-
veyance exe-
cuted, shall
bind him.

Carfoot against Carfoot. November 10.

[35]

On a Demurrer.

Lands were devised to the feme for life, afterwards to be sold by the executor for younger children's portions; the executor dies, the feme dies: the younger children prefer their

Lands devised
to be sold by
executor who
dies; the bill

brought a-
against the
heir, who de-
murs, and o-
ver-ruled.

4 Leon. 8.

2 Vent 350.

1 Levinz. 238.

Post 104. 159.

2 Chanc. Ca-
ses 30. 68, 69.

bill against the heir ; he demurs, because but an authority in-
the executor, which is dead with them, but the demurrer was
over-ruled.

Regnes against Lewis. November 17.

On a demurrer.

Wife sues for
separate main-
tenance with-
out the hus-
band.

The Demurrer was, for that a feme covert sued without
her husband. But she being to be relieved touching a sepa-
rate maintenance agreed to by her husband, the Court over-
ruled the demurrer, declaring the feme might sue without
her husband.

The LORD CHANCELLOR.
Baron TURNER.

Churchil against Grove and others. November 24.

On a Plea.

Purchaser
without notice

The Plaintiff having a judgment and a mortgage, exhibited
his bill against the mortgagor and conusee of a statute by
the mortgagor, to have a discovery what is due on the statute,
that being precedent to the plaintiff's securities, and upon
payment to have the same set aside.

[36]

The cognizor pleaded, that he having extended his sta-
tute, and the cognizor and he stated accounts, and the sum
of 3000*l.* being due to him, he in consideration thereof had
an absolute conveyance of part of the extended lands, and
showed what lands were conveyed to him by the cognizor,
and that thereupon he assigned the residue of the extended
lands to the cognizor ; and that so he was a purchaser
without notice of the plaintiff's title, for a valuable conside-
ration.

It was also pleaded, that the cognizor was in execution on
the plaintiff's judgment, and so the plaintiff could not ex-
tend the lands, nor the lands be liable during the life of the
cognizor.

On the plaintiff's part, it was to the first point insisted,
that it did not appear that the defendant was a purchaser,
there being no new money paid upon the executing the con-
veyance ; but coming in for the consideration of money due
on the statute, was no purchase. And that it was common
equity for him that had the subsequent judgment to be re-
lieved against the precedent statute on payment of what was
due ; and that there was, for ought appeared, no more
there ; and that the account made up between the cognizor

and cognizee on the pretended purchase ought not to affect the plaintiff; and that therefore the defendant's purchase being subsequent to the plaintiff's security, ought not to be aided by the statute; and that the plaintiff's judgment being of record, the defendant was bound to take notice thereof at his peril; and that in this case the defendant ought not to protect his pretended subsequent purchase by his precedent statute, but that he ought, upon payment of the statute, to yield possession to the plaintiff.

But this was strongly opposed by the defendant's counsel; who insisted that the defendant was a purchaser; and that though no new money was advanced on the purchase, yet he assigned over and parted with part of the extended lands in consideration thereof, which was as valuable as money. And that it was the constant justice of this Court, that if a purchaser bona fide did buy an eigne incumbrance, statute or judgment, and there were a judgment or statute mesne between that and his purchase, of which he had no notice at his purchase, that he should protect his purchase with the eigne incumbrance so brought in. And it was insisted, that though judgments were on record, and a purchaser is bound to take notice thereof at law, yet in equity, where the cognizee of a judgment comes to be helped to extend his judgment against a purchaser, he must prove express notice of the judgment in the purchaser, or else shall never be relieved against the purchaser. And upon this point, the plea was allowed; and as to the other point, that the cognizor being in execution upon the judgment, and so the land not to be charged during his life: it was strongly insisted, that was no good exception in equity, for that the bill was to discover incumbrances, which the plaintiff could not have after the cognizor's death. And it was positively affirmed that it had been ruled here, that a bill will lie, notwithstanding the debtor was in execution upon the judgment. But this point was not much debated; howbeit, the court inclined in opinion, that this part of the plea was not good.

2 Vent. 337,
334.
Hard. 173.
2 Chanc. Cas.
208, 20, 35, 213
1 Chanc. Cas.
162, 163. 301.

Purchaser shall protect his purchase by buying; an eigne in an incumbrance -

[37]

Purchaser shall not be affected by a judgment in equity, without express notice of it before the purchase.

Whether the cognizee of a judgment having the cognizor in execution, can bring a bill whilst he lives to charge the lands.

Williams against Arthur. November 24.

On a Plea and Demurrer,

A decretal order was produced in 1657, for several matters; and then after the cause had depended on account three years, a decree was drawn, wherein the first decretal order was recited, but part of the matter thereby decreed was omitted in the decretal part of the decree itself; and soon after the decree signed and enrolled, the defendant died. A scire facias was sued to revive, and in the prosecu-

Part of the matters being omitted in drawing up the decree, a

bill of revivor
lieth to revive
those matters.

tion thereupon the plaintiff discovered the omission, and so could not have the benefit of that part which was omitted in the decree that way, and the defendant being dead, could not help that omission by a motion upon the surprise. The bill now was a bill of revivor to revive so much of the decree as was omitted, as was alleged: howbeit, in truth the bill was to the whole decree.

It was pleaded, that the decree being enrolled, a bill of revivor did not lie, but a *scire facias*. Ordered, that the plea and demurrer be over-ruled.

Chief Justice FOSTER.

The MASTER OF THE ROLLS.

[38]

Merry against Abney the father, and Abney the son, and Kendal. November 26.

All which were heard on Abney the son's plea, about Trin. 12 Carr. II. and the same cause heard this day.

Kendal contracted with the plaintiff to sell him certain lands in Leicestershire. Afterwards Abney the father, who lived near the lands, in behalf of Abney the son (a merchant in London) purchaseth those lands of Kendal, and had a conveyance from Kendal to Abney the son, and his heirs. The plaintiff's bill was to be relieved upon his contract with Kendal, and against the conveyance to Abney, and charged notice of his contract to both the Abneys. Abney the son pleads himself to be a purchaser bona fide, without any notice of Kendal's contract with the plaintiff, and without any trust for his father.

Notice to him
that purcha-
seth for ano-
ther, shall af-
fect the pur-
chaser himself

The Court declared, that notice to the father in this case was notice to the son, and should affect the son, who was the purchaser. So that notice of a dormant incumbrance to a party that purchaseth for another, shall affect the very purchaser. And accordingly was this cause decreed, it appearing at the hearing that Abney the father had notice of Merry's contract before he purchased for his son.

The MASTER OF THE ROLLS.

Seabourne against Blackstone. November 26.

The wife received money due on a bond entered into by one to her husband. She usually received and paid money:

he got judgment on the bond. Ordered, that he acknowledge satisfaction thereupon.

The LORD CHANCELLOR.
The MASTER OF THE ROLLS.

[39]

Davie against Beardsham and his wife.

Davie agrees for the purchase of certain copyhold lands, which were surrendered out of court to his use; but before admittance he dies, having other copyholds, and having made his will after the said contract, and thereby devised to the plaintiff, (who was then and at his death his visible heir) all his copyholds after his death; his wife being *priviment enseint* at his death, is delivered of the defendant's wife, who then becomes the heir of the devisor. The plaintiff taking it for granted that the copyholds so contracted for, did not pass by the will, suffered the heir to be admitted thereunto, and held the same of the heir for twenty years, and paid her rent for that time, and had agreed so to do as long as he should hold them. Afterwards differences arising between the heir and him about other matters, the plaintiff exhibited his bill (*inter alia*) to have those copyhold lands decreed him. And it was declared upon the hearing by the court, that it was clear the said copyholds so agreed for did pass by the will to the plaintiff, for that the purchaser had an equity to recover the land, and the vendor stood trusted for the purchaser, and as he should appoint, till a conveyance executed. And the case of the lady Fohaine, about 1657, was cited, where it was ruled, that if upon articles for a purchase, the purchaser dieth, and deviseth the land before the conveyance executed, the land passeth in equity. But in the principal case, inasmuch as the plaintiff had admitted the title to be in the heir, and paid her rent, and agreed so to do, the court would not decree it; but declared, if the plaintiff had come in time, it was proper to be decreed.

Hard. 160.
216.
2 Vent. 361.
2 Chanc. Cases 161.
Ant. 34.

Lands contracted for, pass by devise of the purchaser.

Vendor after contract to purchase, stands trusted for vendee.

Jones against Done.

In which case a decree was made, whereby it was decreed, that an office was extendible in law or equity.

An office extendible.

Bishop against Bishop.

An award confirmed in part, and made void in part.

[40]

Rep. Chanc. Part 1. 142.
Award.

The LORD CHANCELLOR.
The MASTER OF THE ROLLS.

Gilbert against Hawles. 12 and 17 Feb. 14 Car. II.

After a decree
the plaintiff
may not dis-
miss his bill.

The bill was to be relieved against an action for rent, and at the hearing of the cause it was decreed to account, and that the plaintiff should pay what was due to the defendant on account. The account was stated by a master; then the plaintiff moved to dismiss his bill, paying what costs the court would assess; which was opposed, for that the judgment of the court being given, the plaintiff ought not to abuse the court and depart from it; and the case of Wingfield and Thomas was cited, whereby upon an obligation the plaintiff here was decreed to pay principal, damages, and use: and afterwards the plaintiff there would have dismissed his bill, but it was denied.

Churchill insisted, that *quilibet protest renunciar, juro pro se introducto*.

The Master of the Rolls directed it to be moved before the Chancellor, and 17 Feb. it being moved before him, it was denied. And the said Chancellor and Judge Brown, 17 Car. II. between Cheatley and Packington, gave the like rule in the same case.

Edgworth against Davies. 1 July, 14 Car. II.

Upon a Plea.

[41] The bill was to have an account of the profits of land which the defendant had received on trust for the plaintiff during his minority, and for moneys received upon bonds belonging to the plaintiff, and for writings, &c. The defendant pleaded, that the lands lay in Cheshire, and that the defendant lived in Cheshire, in the county palatine of Cheshire and Lancashire, and therefore not within the jurisdiction of this court. This plea having been formerly argued before Judges in absence of the Chancellor, they ordered precedents to be produced, which were as follows: *Hern against Smith*, 12 Eliz. for that the lands lay within the dutchy, was over-ruled. *Sherborne against Vaughan*, 13 May, 14 Car. The bill was, to be relieved on trust; the defendant pleaded the jurisdiction of the dutchy; this was *ex parte*. But in my Lord Coventry's time, *Hales against Daniel*, 24 October, Car. I. *ad. idem*; in which case, the thing being for a personal estate, the court over-ruled the plea of the county-palatine; and in the same cause, Mr. Page, to whom it was referred to certify, reported upon the view of precedents, that the jurisdiction of the counties pa-

latine was allowable between parties dwelling in the same county, and for lands there, and for matters local. And in the argument of the principal case, was cited the case of Sir John Egerton and the Earl of Derby; and upon long debate in the principal case, the plea was over-ruled, but without costs.

Plea, jurisdiction of the dutchy, over-ruled without costs.

The LORD CHANCELLOR.
Baron TURNER.

Clark against the Lord Angir. 3 July, 14 Car. II.

Upon a Demurrer.

A legacy being given to a feme covert, who was covert when the legacy was given; the husband of the wife, without her, exhibits a bill for it, because the wife was no party. The defendant demurred, for of things merely in action belonging to the wife, as a bond, &c. she ought to join in the suit; but otherwise it is of a rent running in the wife's right after marriage. If the husband alone should sue the bond, and be nonsuited or dismissed, that will not conclude the case; but if he die before judgment or decree, the wife cannot revive the suit.

Where a feme covert ought to join in a title, suit, &c. and wherenot.

Parker against Palmer.

[42]

Upon an appeal from a decree at the Rolls. 27 Janury. 14 Car. II.

Parker sold a lease which he had from the dean and chapter for three lives, to Palmer, &c. And it was agreed Palmer should pay 4,320*l.* for it. After the defendant agreed with the plaintiff, that if he would abate him 420*l.* he would re-convey the lease whenever the king and dean and chapter were restored. The plaintiff thereupon abated the 420*l.* and the king and church being now restored, the plaintiff exhibited his bill for the lease, which the Master of the Rolls decreed to him.

Note, that this was decreed against the son of the purchaser, the father being dead.

The question was, whether he came in by settlement, or as an occupant.

Agreement, though the considerations be unequal, decreed.

Upon appeal to this decree, it was affirmed by the Lord Chancellor and Bridgman. And in this case it was objected that this court ought not to decree that, for it was but in the nature of a wager, and the consideration unequal and penal; and that an action more properly lay; and that it was at the

discretion of the court to decree an agreement or not, when it ought to be performed *ex debito Justitiæ*. Yet it was decreed *ut supra*.

The LORD CHANCELLOR.

Savill against Darrey.

1 Rolls. Abr.
382 Z.

Pl. 1. Ant. 3.
Money decreed by rule of court to be paid before a bill of review, but upon giving security to pay it, the rule dispensed with.

A decree was obtained for a great sum of money : a bill of review was brought, and new matter assigned. The rule of court was pleaded, that the defendant ought first to pay the money before the bill should be brought into court. Let him give good security for the money, and we will dispense with the rule. The like case between Baston and Biron, by order of the house of peers, about 1662.

[43]

DE TERM. SANCT. HILL.

Anno Regis 15 and 16 Car. II.

IN CANCELLARIA.

The MASTER OF THE ROLLS.

Curtess against Smalridge. January. 26.

The defendant's wife had pawned her husband's plate to the plaintiff for 110*l*. The defendant in trover for this recovered 115*l*. damages against the plaintiff, and judgment for it. A bill was to be relieved against this judgment, for that the defendant was privy to the pawning, and had the 110*l*. And the proofs being read, it appeared that the defendant had confessed so much ; which if it had been proved at the trial, it was agreed the defendant could not have recovered in the trover ; and there being no proof now, that the defendant at law could not by reason of any accident have his witnesses at the trial, the court would not on any neglect of his grant a new trial.

Rule or maxim. Nothing a ground for a new trial after judgment, that is not ground for a bill of review.

And it was insisted upon as a rule, that nothing shall be a ground to direct a new trial to avoid a judgment at law, that would not be ground for a bill of review to reverse a decree ; and a confession subsequent to a decree, no ground for a bill of review. Nor is the want of any evidence or matter which

might have been used in the first cause, and of which the party had then knowledge, any ground for a bill of review; and here is no proof but that the plaintiff might have had the witnesses that were examined here at the trial; and so this cause was dismissed.

Post. 46. with
the notes
thereupon.

The LORD CHANCELLOR.

Baron TURNER.

Read against Hambey. February 18.

On a Demurrer.

The bill was to explain a decree, wherein the case was, one seized of the manor of Wrangle, worth near about 110*l.* per annum, and another of a farm in Wrangle, held of the same manor, worth 250*l.* per annum, and the fee of both came after into one person's hands, he having articulated to settle the manor of Wrangle, worth 110*l.* per annum, with the improvements. It was on the articles decreed, his heir should convey the manor of Wrangle, with all the improvements, to the plaintiff in the first suit; and if the manor was not worth 110*l.* per annum, it should be made up out of the other lands. By this decree and unity of possession of the manor and farm, the plaintiff claimed all the manor and farm; and the bill being to explain the decree, charged the farm to be worth 250*l.* per annum, and the manor 110*l.* per annum, and therefore desired to have the decree explained, whether the decree intended all, or only the manor according to the articles? The demurrer was, for that it was an original bill, and sought to alter or change the decree.

For the plaintiff it was insisted, that the plaintiff was without any possibility of help but by this bill; for that it being to be relieved upon a fact not in issue, nor appearing in the former cause, a bill of review would not lie for it; and that the defendant by having demurred, had admitted the bill to be true; and then the case was, that the lands claimed without the decree, were worth 400*l.* per annum, whereas the articles on which the decree was founded, were but for 110*l.* per annum; and therefore it was strongly urged that they ought to answer.

For the defendant it was replied, that no original bill ought to explain a decree upon any matter precedent to the decree; and the consequence of that was alleged to be dangerous, for it would be introductive of a means to blemish and hinder the execution of a decree. And as to the hardship of the decree, or the intent of it, it was insisted, that that would be fit for determination upon an execution for nonperformance,

[45]

Original bill
not to be ad-
mitted to ex-
plain a decree
upon a fact
precedent.
2 Bulstr. 197.
215. 3 Bulstr.
118.

Cro. Jac. 336. where the defendant might set out what he had to say for his
 1 Roll. Rep. excuse, and then it would be proper for the court to declare
 331. 4 Inst what was the intent of the decree, and that the justice or in-
 86. 1 Roll. justice of the decree might then be determined. And of this
 Abr. 382. Z. opinion the court seemed to be. But the plaintiff's counsel
 Pl 3, 4. insisting, that the defendant would be bound in a prosecution
 Lane 68, 69. on the decree by the letter of it, and could not then put any
 Ant. 43, 44. interpretation on it against the letter of it, they therefore
 Post. 54. prayed leave of the court to set forth the special matter on
 examination; which the court would not give an order for.
 And as to the plaintiff's objection, that the demurrer admit-
 ted the bill, and so ought to have an answer, because the
 manor and lands were of the value *ut supra*, it was answered
 by the defendant's counsel, *alligari non debuit, quod probatum*
non relevat; and the demurrer was allowed. Then the
 plaintiff's counsel prayed the signing and enrolling of the
 dismissal of the demurrer might be stayed till the plaintiff
 was examined on interrogatories for breach of the decree,
 &c. But the court denied it.

Non debet al-
 ligari quod
 probatum non
 relevat.

[46]

DE TERM. PASCHÆ.

Anno Regis 16 Car. II.

IN CANCELLARIA.

Bautrey and his wife against Ibson. May 4.

William Ibson, being possessed of a term for years from the Vicars Coral of York, assigned the same to trustees, and then buys the inheritance from the trustees for sale of church land: and before marriage, covenants to stand seized to the use of himself and wife, for life, for a jointure.

In 1659, William Ibson died, having made his will. After his death, his relict entered and held the lands; and then, upon agreement with his executors for money paid, released to them the personal estate of the testator, and all demands for the same. Soon after, the king being restored, the title of the inheritance under the said purchase became void. The widow married the plaintiff, and they two brought their bill against the executors of William Ibson, and the assignees and trustees of the lease; and it was to the end, that though the inheritance was evicted, they might hold for so long of the term as the jointress should live; and that the release

A release set
 aside by a sub-
 sequent acci-
 dent having

might not bar her of that, because not intended when the relation to the lease was given; nor was the lease then looked on as part of the personal estate. original equity

1. Quest. was, whether, the inheritance being gone, the lease which was to attend it, should go now, according to the use in the covenant to stand seized? [47]

Resolved in this case, it being a settlement in marriage, and so on a consideration, it should go to the wife for so many years as she lived. But it was said, it would have been another case between the heir and executor of the covenantees.

2. Quest. if the release of the demands to the personal estate should bar the feme of the benefit of the term?

And it appearing by the proof, that the agreement which begot the release, was before the title to the inheritance was avoided, and concerning that which was then look'd upon as personal estate, and not touching the lease; and that notwithstanding the release, the feme continued the possession: it was resolved the release should not bar or prejudice the plaintiff's title in right to the lease. And it was decreed, that the plaintiff should hold for so many years as she lived; and that if the lease were renewed, she paying proportionably to her estate for life, that the jointress should hold for so many years as she lived, and then to go to the executors.

A. seized of a term for years, purchases the fee, and then settles on his wife for jointure, and dies; the wife releases to the executors all her right to the personal estate and afterwards the fee is evicted, and notwithstanding the release, the wife decreed to hold during the term.

The LORD CHANCELLOR.

Judge BROWN.

The MASTER OF THE ROLLS.

Kinaston against Maynwearing. May 4.

The plaintiffs were the children of the defendant's sister; and the defendant's mother, during his minority, as his guardian managed his estate. And as to the lands in question, it was pretended those were settled by the defendant's father on the plaintiff's mother, being the defendant's sister; and the defendant's mother and guardian for about two years before the plaintiff's mother's marriage, put her into possession of those lands, and upon her marriage articulated that those lands should be settled on her and her heirs; and to those articles the defendant, then an infant, was a witness. upon this matter (tho' there was no proof of the deed whereby it was pretended the defendant's father settled the lands upon the plaintiff's mother) the court decreed against the defendant, upon colour of equity for want of the deed, and yet there was no proof of a deed, which was conceived very hard, for the court to raise an equity out of a deed when it was not proved.

[48]

Equity raised out of a deed which was not proved.

The LORD CHANCELLOR.
MASTER OF THE ROLLS.

Thirveton against Collier. May 11.

Hardr. 131.
183, 333, 22.
118, 104.
2 Vent. 348.
2 Chanc. cas.
29.

The bill was, to have a decree for an inclosure upon an agreement. It appeared by the bill, that there were to be eighteen allotments, and there were but fifteen parties to the suit; and so it was objected by the defendants, that all the parties to the agreement were not parties to the suit; and also that there were other persons that claimed common in the ground to be inclosed, that were not parties either to the agreement or suit; and so to decree that agreement, would be to do a manifest wrong, and be an occasion of suits and quarrels.

Whereunto it was answered by the plaintiffs, that though there were eighteen shares, some of the persons were to have two shares, so as that made up the eighteen; and that there were others had common but by vicinage: but nothing of this appeared to be alleged by the plaintiffs.

Agreement to inclose common, parties that have interest in the common, and not privy to the agreement shall not be bound.

It was decreed nevertheless, that the agreement for the inclosure should be performed, and a commission was awarded to set out each person's title. And the court decreed, that if there were any that had interest, and were not parties to the agreement, they could not be bound, and so at no prejudice: but, however, it should not be in the power of one or two wilful persons to oppose a public good.

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The LORD CHANCELLOR.
The MASTER OF THE ROLLS.
Justice WINDHAM.

Goodrick against Brown. May 11.

Fines pursuant to a decree shall work only according to the decree.

1. Resolved, that whereas by a decree of this court a fine was levied to a particular end and purpose, which would operate farther in point of law, than to that end which the decree ordered it, that such fine should not be suffered in equity to work farther than the decree intended.

Fine and recovery shall work on a trust as on an estate at law.

2. That the fine or recovery of a *cestui que trust* should bar and transfer the trust, as it should an estate at law, if it were upon a consideration: but otherwise Justice Windham doubted of it; for he said he looked upon this court as remedial to those that come in upon a consideration, &c.

Equity only remediable to those that

3. That whereas the person that suffered the recovery was tenant for life, in point of law, and there had been an agreement precedent to the recovery, by the ancestor that was

dead, for the settling of the premises, so as to have made the tenant for life tenant in tail, that the recovery should be good in equity, and should work upon the agreement.

Against which it was objected, that the recovery was a wilful forfeiture in point of law, and was voluntary, and no consideration; and so the truth appeared, that the defendant was as near in blood to the first ancestor as the plaintiff; and if this court would maintain a voluntary recovery of a trust raised upon a conveyance, there was not so much in this case; for here was but an agreement, and though that agreement might upon a bill have been decreed, yet there being never any such bill, the recovery ought not to be supported. As to this point and the second, the judge would not deliver any opinion, but the court decreed it.

come in upon consideration.

A wilful forfeiture by suffering a recovery in point of law, supplied and helped in equity.

At the ROLLS. THE MASTER OF THE ROLLS.

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Scot against Rayner. May 11.

The defendant had sued the plaintiff at law on a single bond entered into by the plaintiff to the defendant's husband, the defendant suing there as administratrix to her late husband. The bill here was, that in truth the defendant's husband was not dead, and there appearing some probable evidence that he was not dead, but concealed himself, and the defendant pending this suit having got judgment against the plaintiff, the court awarded an injunction to stay execution, and directed a trial at law to be, whether the defendant's husband was dead or not.

Issue, whether a person to whom another had got administration, was dead or not.

The LORD CHANCELLOR.
Judge BROWN.

Wan against Lake. May 12.

On a Demurrer.

The demurrer was to a subpoena in nature of a *scire fac'*, and it was because he that brought the subpoena did not thereby allege himself to be heir or executor to him that had the decree.

Post. 56.

Resolved, That there never was any demurrer of this nature before: and the subpoena was no record, nor any where filed, and so not to be demurred to: but the cause was to be showed upon the return of the writ on the order, and the order did mention him that brought the writ to be both heir and executor. So this demurrer was conceived very ridiculous, and over-ruled.

A subpoena no record, nor ought to be demurred unto.

The LORD CHANCELLOR.
Judge BROWN.

Freak against Hearsey. May 12.

On a Demurrer.

Executor of
the mortgagee
ought to be a
party where
the heir sues
to have the
money paid, or
the mortgage
foreclosed.

The heir of the mortgagee exhibited a bill to have the mortgagor pay the money, or to be decreed to make further assurance, and be foreclosed of redemption. The demurrer was, because the executor of the mortgagee, who might have a title to the mortgage money, was no party; and the demurrer was allowed.

IN COURT. THE MASTER OF THE ROLLS.

Glover against Portington. May 14.

Joss Glover (the plaintiff's father) for securing 50*l.* per annum to Anne his mother-in-law for life, in lieu of 50*l.* per annum which she had chargeable on other lands of his which he was about to sell, 11 May, 13 Car. 1. surrenders certain copyhold-lands (of gavelkind) to Thomas Roll (brother of Anne) and his heirs, in trust for Anne, upon condition, that if Joss Glover, his heirs or assigns, paid Anne 50*l.* per annum during life, the surrender to be void. Thomas Roll was admitted; Joss Glover failing to pay the 50*l.* per annum, 4 July, 20 Car. I. Thomas Roll surrendered the premises to the use of Anne for life, the reversion to himself and his heirs (but in trust for her and her heirs,) she was admitted; Thomas Roll died, the premises descended to his children and grandchildren, some whereof yet infants, and one a lunatic. 22 Jan. 1651. Anne by will directed that the arrears of the 50*l.* per annum should be paid to her executors (which the defendant Portington is) to such purpose as therein is expressed, and declared that her nephews the sons and grand children of Thomas Roll should permit her executors to receive the rents and profits towards payment of legacies, and appoint her said nephew and grandchildren, that if the plaintiff (being heir of Joss Glover) should within three years after her death pay her executor all arrears of the 50*l.* per annum, that they should surrender to the plaintiff and his heirs, and remit the plaintiff 100*l.* thereof, and the interest of the whole, so as he paid the arrears in three years; and declared, that if the plaintiff failed to pay the arrears in three years, the premises should be surrendered to her executor; and the arrears being paid, she wills her

executor to pay the overplus to the plaintiff, and to surrender to him. And in July 1654. Anne died, and in February next following the bill was exhibited to have a discovery of what was paid, and that paying all arrears but the 100*l*. and interest, he might have a surrender from Rolls, who claimed the estate to their own use. This cause was, through infancy of the defendant so delayed, that their answers could not be gotten, and through absence of the plaintiff out of England, which was nigh ten years ; and now it was decreed, that if the plaintiff would redeem, he should pay all the arrears and interest.

Serjeant Fountain drew a petition to the Master of the Rolls to re-hear it on the point of interest, and afterwards moved it in court ; and the Lord Keeper (the Master of the Roolls being present) recommended it to him to re-hear it ; and as to the point of the 100*l*. of the principal which was to be abated by will, the bill came within six months after the death of Anne, and it was not safe to go to hearing without the trustees, whereby to have a surrender, and they were in infancy and lunatic, which was the principal reason the cause depended so long.

Mortgagee remits by will part of the mortgage money and all the interest if the rest be paid in three years.

Serjeant Fountain did upon a discourse between him and A. B. agree it was against the plaintiff as to the 100*l*. (though Churchil was clear of another opinion) for Serjeant Fountain said, that it being a voluntary conditional gift, the plaintiff ought, if he would have the benefit of it, to have performed it by payment within three years, and sought a reconveyance after : but as to the matter of the interest, that was stronger ; for that the will appointed that the arrears being paid, the land should be surrendered to the plaintiff ; and it was said, the testator intended a benefit to the plaintiff by the appointment ; and if he should pay the arrears and interest, it was no benefit, for then the premises without such appointment ought to be surrendered to the plaintiff, for the same were not forfeited above ten years when the bill was exhibited.

The mortgager failing to pay within three years, loses the benefit of the bequest.

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The Master of the Rolls, upon the re-hearing, 25 June, Car. II. confirmed the first decree. Serjeant Fountain, Master Churchil, and Master Keck, for the plaintiff. Master Solicitor Finch, and divers others, for the defendants. And afterwards there was a bill of review to reverse this decree ; to which Portington demurred, and insisted there was no error in the decree. And this demurrer was argued in Trinity Term, 1665, before the Lord Chancellor and Baron Rainsford. And in the debate it was insisted by the defendant's counsel, that this was a bill of review of a strange nature ; for that the plaintiff, who had the decree, did by his bill of

review complain, that he had not enough decreed ; whereas if a review lies, it lies only for him against whom the decree or dismissal is. After long debate, the demurrer was overruled.

[54]

DE TERM. SANC. TRIN.

Anno Regis 16 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.
Baron RAINSFORD.

Combs against Proud. June 16.

The bill was a bill of review ; and in drawing up the decretal order, the matter upon which the decree was made was declared to be proved, and the case stated far different from the fact.

Matters assigned for errors in a decree must appear in the decree itself; for being of record, must be tried by it. If the fact be mistaken at the hearing and decretal order, that must be rectified by rehearing, and not otherwise.

[55]

Lane 69.
Hard. 51.
1. Roll. Abr.
382. Z. Pl. 2.
Lane 70. Ant.
45.

The errors assigned by the bill were, that the decree was grounded on matters not proved, and instanced in particulars, and that the matters mentioned in the decree to be proved were not proved, &c. The demurrer was general, that the decree contained no error in law, and that the matters alleged for error were but mis-judgment. And upon debate it was declared, that upon a bill of review, the causes for review must arise and appear upon the case as it is stated in the fact ; and that the fact must be admitted as it is there stated ; and that touching where the fact is mistaken, upon which the court grounded their judgment, it is proper in such case for that reason to have the cause reheard before the decree be enrolled : Yet after the decree enrolled, that is no ground for a bill of review ; for the decree enrolled is matter of record, and can be tried by the record itself after it is enrolled, and must be taken to be true ; and so the demurrer was allowed.

The original case of Comb and Proud was as follows. It was heard at the Rolls in November last.

The original bill was to be relieved against an account stated between the mortgagor and the heir of the mortgagee, under hand and seal, upon suggestion, that it was agreed upon the

sealing, that if there were any mistake in the account, the same should be reviewed and rectified. The defendant denied the agreement, and pleaded the account stated, and three meetings in order to it, and the same perused first by the plaintiff and affirmed on his behalf, and then fully consented to and sealed. Issue was taken on the plea, and the plea was proved: yet it appearing to the court by the *quantum* of the same, that the account was made up of interest upon interest, and the court taking the agreement to be proved, (howbeit it was not) decreed the account stated to be set aside, and the parties to go to account *ab origine*.

Observe, the reason why the review did not lie, was, because, as the decree was drawn up there was no error appeared in it.

The LORD CHANCELLOR.

The MASTER OF THE ROLLS.

Bolton against Arme. June 17.

A lessee of the crown made an under lease of a rent; during the usurpation the state voided the first lessee's estate, and exposed the crown interest to sale. The under lessee applies to his lessor for protection; he bids him shift for himself; thereupon the under lessee pays his rent to the purchaser from the state for some time, and after the under lessee purchases his tenement from him that purchased of the state. Upon the king's restoration, the first lessee brings debt against his under lessee, for the arrears of rent from the time he discontinued payment to him, and had judgment by default. The under lessee prayed to be relieved against this judgment, which was by the bill alleged to be by surprise, though no surprise appeared in obtaining the judgment. Decreed, that the judgment be vacated, for that the rent was discharged by the act of oblivion. Of which, the Lord Chancellor said, a court of equity was as proper a judge or interpreter as the judge at law.

A judgment for a matter discharged by act of oblivion, decreed to be vacated.

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Court of equity a proper interpreter of a statute.

Williams against Owen and Arthur. June 24.

On a Demurret to an answer.

The defendant having answered the bill of revivor, which sought to revive the order on hearing, as to so much as was not within the decree enrolled, had by his answer set forth matter that tended to draw into question and new examina-

Ant. 50.

Demurrer to
an answer.

tion an agreement which was contained within the decree as it was enrolled, and thereby fully settled. Therefore, to so much of the answer as tended again to draw into examination the matters settled by the decree enrolled, or by the order on hearing, the plaintiff did demur, for that it would be of evil consequence, and introductive of perjury, to permit a re-examination of any of those matters. Upon debate of this demurrer, which was drawn by Serjeant Fountain, it was averred by the defendant's counsel, that a demurrer to an answer was never known before in a court of equity, (though serjeant Glyn for the plaintiff affirmed he had known of a demurrer to an answer before.) And though it did seem unreasonable to the court that a defendant should by answer draw again into examination the matters formerly examined into and settled, yet the court doubted what to do as to the demurrer. Some at the bar said, the court should have been moved in this special case for an order to restrain an examination of all matters formerly examined and settled. And it was now ordered that there should be no matters re-examined, that were examined to before. This, I take it, was the rule that was given; *tamen quere*.

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The LORD CHANCELLOR.
Baron TURNER.

Nicholson against Sherman. June 24.

On a Demurrer.

The testator's
estate, in
whosoever
hands, liable
in equity to
his legacies.

A. bequeathed a legacy, and makes baron and feme his executors, and dies; the baron afterwards makes his will, and makes the feme and his son executors, and dies: the legatee of A. exhibits his bill against the feme and her son, setting forth the case, *ut supra*, and chargeth, that the estate of A. liable to the payment of the legacy, is come all to the hands of the feme and her son. The demurrer was by the son, for that the feme, who was the surviving executor of A. was only liable to his legacies, and the son being executor of one of A's executors that died first, leaving an executor of A. to survive, was not privy in law, nor accountable for the estate of A. which though it be so in point of law, yet inasmuch as it was charged that the son had gotten the estate of A. the demurrer was overruled, the court declaring that the estate of A. in whosoever hands, ought to be liable to his legacies.

And in Trinity term, 1665, this cause was heard and decreed.

DE TERM. SANCT. MICH.

Anno Regis 16 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.

Fleming against Walgrave. October 28.

The case was thus : 900 was secured by a lease for years for a feme sole, in case she did not marry contrary to the liking of Sir Edward Walgrave and his lady ; and if she did, then to such persons as Sir Edward and his lady, or the survivor of them, should nominate ; and for want of such nomination, then to Sir Edward Walgrave and his lady, and the survivor of them ; and in this case Sir Edward Walgrave and his lady were lessees in trust. The feme sole married without their consent ; Sir Edward dies without any appointment, and so did his lady who survived him, and had after the death of Sir Edward made a general deed of gift of all her goods and chattels to one Sandal. The question was between Sandal and Francis Copledike, who was administrator to the lady, and also to the feme sole, who should have the benefit of this lease ? The court was of opinion, that it was not in the power of Sir Edward and his lady to have disposed of this lease otherwise than for the benefit of the feme sole if she had lived ; and that Francis Copledike, as administrator to her, and also to the lady, was well entitled to the benefit of the lease, and so decreed it.

A trust for raising money for a feme sole if she marry with consent of the trustees, and if not, such as the trustees shall name, or else to themselves, shall ensure to the administrator of the feme sole.

The LORD CHANCELLOR.

LORD CHIEF JUSTICE BRIDGMAN.

[59]

Dickenson against Knowell. November 3.

The plaintiffs were bound to one Crofts (to whom the defendant was executor) in 600*l.* for the payment of 300*l.* Crofts was sequestered by the usurper, and for 300*l.* which the states owed the plaintiffs they had an order from the committee to retain the 300*l.* of Crofts for satisfaction. The bond was upon the king's restoration put in suit ; to be relieved against which, was the scope of the bill. The question was, whether the defendant was barred by the act of oblivion ?

Bridgman being present, he declared, he conceived that the defendant, inasmuch as Crofts still kept the bond, and the money was not actually paid, but retained, was not discharged by the act of indemnity. But it was referred to make a case.

An act of indemnity makes good only actual payments.

AT THE ROLLS.

Rand against Cartwright. November 3.

A man makes a voluntary deed, and then a mortgage of the same lands. The first deed upon a trial at law is found fraudulent; he to whom the deed is made, exhibits a bill to redeem the mortgage.

A voluntary conveyance precedent void, quoad a mortgage subsequent prevailed so as to pass the equity of redemption.

It was held, that though the first deed was fraudulent, because voluntary *quoad* the mortgage money, and *pro tanto*, yet that it was good as to the equity of redemption, and would pass that; for that a voluntary deed will bind the party that makes it, and his heirs. But the matter was compromised.

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Justice ARCHER.

Rennesey against Parot. December 15.

On a Demurrer.

Legacies payable at 21, and no maintenance in the mean time.

Q. What equity may do in this case.

The plaintiffs were legatees, their legacies to be paid at twenty-one years of age. They suggest they had no maintenance, and by their bill a guardian prays that the defendant, who is the executor of the will, may allow them maintenance.

The defendant demurred; for that the plaintiffs were under age, and their legacies were not to be paid till twenty-one, and so had no cause of suit.

Collins for the defendant, and none for the plaintiff. The demurrer overruled.

The LORD CHANCELLOR.

Crispe against Nevil. December 16.

When the first answer is reported insufficient, the defendant if he answer again, without excepting, is to answer all the points excepted, though the same exceed the bill.

The plaintiff excepts to the answer. The exceptions are referred. The master certifies the answer insufficient in the points excepted to. When the defendants fully answer to the charge of the bill. But in truth the exceptions were longer than the bill. The master upon a reference to the second answer, reports the answer insufficient in the points excepted unto. The defendants except unto the report, and upon debate the defendant's counsel insisted they had answered well to the bill, and that they ought not to be put to answer any matter but what is in the bill. But the plaintiff's counsel insisted, that inasmuch as the defendants did not except against the first report, but had since answered, they had admitted they ought to answer to all the matters of the exception; and so it was ruled.

DE TERM. SANCT. HILL.

Anno Regis 16 & 17 Car. II.

IN CANCELLARIA.

The MASTER OF THE ROLLS.

Cocker Knight, and the Lady Elizabeth his Wife, Daughter and Heir of Edmund Ludlow, son and Heir of Henry Ludlow, against Bevis. Jan. 23.

Upon hearing and debating the matter in question between the said parties this present day, in presence of counsel learned on both sides, the substance of the plaintiff's bill appeared to be, that Henry Ludlow having borrowed the sum of 2000*l.* of Peter Bevis, the defendant's father, did for security of 1000*l.* thereof, by indenture dated Sept. 25. and 5 Car. I. demise unto the said Peter Bevis the manor of kingston Deveril, with its appurtenances, for the term of 99 years; and for security of the other sum did, by indenture the 7th of the same month in the year aforesaid, demise several woods called Sawley, Eulel and Ely, and divers grounds, unto the said Peter Bevis for the term of 99 years aforesaid. And that the said Peter Bevis, by indenture 29 Octo. 5 Car. I. did re-demise the said Manor of Kingston Deveril, with the appurtenances, unto the said Henry Ludlow for the term of 90 years, rendering a yearly rent unto the said Peter Bevis of 100*l.* at Lady-day and Michaelmas, by equal portions, during the life of Susan the wife of the said Peter Bevis, and Richard Cubbel, and the longest liver of them; and by another indenture dated 9th October in the same year, did re-demise the said woods and grounds unto the said Henry Ludlow for the same term, rendering unto the said Bevis 100*l.* per annum, during the life of Richard Bevis, William Bevis, and Sebastian Isaac; which said lands at the time of the aforementioned grants were worth to be sold 8000*l.* and that for six years and an half the said Henry Ludlow did duly pay the said rent, amounting to 1300*l.* and that for nonpayment thereof, about the year 1640, the said Bevis made his entry, and received the profits thereof; whereupon John Ridout, gent. and Elizabeth his wife, formerly the wife and executrix of Edmund Ludlow, together with the now plaintiffs, about Easter Term, 1650, exhibited their bill into this court, to have a redemption of the said mortgage, paying what should appear due on the said account.

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Upon hearing of which cause in November following, it was ordered and decreed by the consent and agreement of

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the parties, that the then plaintiffs should pay all the arrearages of the said rents at 160 per annum, and that upon payment thereof the said Bevis should re-convey the said mortgaged premises unto the then plaintiffs, or to whom they should appoint, and to that end did appoint an account to be taken by Mr. Rich., then one of the masters of this court; and what he should find due was to be paid, 200*l.* thereof at Christmas then following, and the residue at the end of six months and six months then next following, by equal portions: pursuant to which order the said master certified there was due to the said Bevis the sum of 4640*l.* which sum was made up of interest during the late troubles at 8*l.* 10*s.* per cent. which said 200*l.* was duly paid at the time prefixed for that purpose. But the plaintiff being a colonel in the king's army, and about the time allowed for the latter payments being engaged in his majesty's service at Worcester, was forced to leave the kingdom, and thereby disabled to make satisfaction according to the decree; nevertheless did write to the said Bevis to sell part of the said lands, and pay himself what was due to him, who accordingly sold unto sir James Thynn and others so much of the said premises as raised the whole money, and yet continued the possession, and received the whole profits of the residue of the lands, and about four years since died, whereby the said premises came unto the defendant his son, as administrator of the said Peter Bevis his father, who continues the possession thereof: Therefore, that the said defendant might come to an account with the plaintiff for the mesne profits by him received, and that he may re-convey the mortgaged premises to the plaintiff, or to whom he shall appoint, he being willing to satisfy the defendant if any thing shall be found due to him on account, is the scope of the bill.

Whereunto the counsel for the defendant insisted, that there was such a decree as in the bill set forth, and that for the nonpayment of the money computed due, which consisted only of the arrears of rent, without any interest for the same, the said decree became absolute: upon which the said defendant rested satisfied, and the sale made to Sir James Thynn was not pursuant to such letter sent by the plaintiff, but sold on the said Peter Bevis's own account, and wherein the said Peter Bevis hath given a general warranty, wherein he hath bound himself and his heirs in perpetuity, which he would not have done for a third person's advantage.

This court nevertheless, after long debate of the matter, and hearing what could be alleged by counsel on either side, and reading of the whole proofs taken in this cause and of the decree made in the former cause, which appeared to be made by consent, was fully satisfied that the decree was in

the nature of a mortgage, and but a security for money, although the same was made absolute, and the said lease to Mr. Bevis confirmed. And inasmuch as the consent and agreement of the said parties was in part executed by the payment of the said 200*l*. and the conditions of the times being then such, that, as appeared by the defendant's own proofs, that part of the lands could not be sold, by which the plaintiffs could not make satisfaction of the said decree, notwithstanding a continued endeavour appeared in the plaintiffs to that purpose, as his desire of sale of part of the said premises to Sir James Thynn, and sale made by the said Mr. Bevis, and much moneys received by him, by fines and otherwise, of some of the tenants of the said manor. And it also appearing that this court hath very often in such like cases of inevitable necessity, and no wilful default appearing in the party, enlarged the time as to the performance of the decree, notwithstanding such decrees have been signed and enrolled; and this appearing to be new matter subsequent to the said decree, was also satisfied the plaintiffs are capable of relief in this court, and do therefore think fit, and so order and decree, that both parties do proceed to an account; and that it be taken by Sir Thomas Bird Knight, one of the, &c. And the plaintiff is at liberty to take out a commission in the country for proof of any thing relating to the said account; upon which account the Master is to allow unto the defendant the whole money decreed, with damages for the same since the time the same should have been paid by the decree, deducting the 200*l*. already paid as aforesaid; and that the said defendant Mr. Bevis do also account before the said Master for what he really made and received of the said manor of Kingston Deveril, by granting estates or otherwise; as also the profits made by the woods called Sawley, &c. by the defendant and his father, before sale thereof unto Sir James Thynn; and also in making and confirming the tenants' estates in the said premises, which said estates, together with the aforesaid sale to the said Sir James Thynn, the plaintiff is hereby decreed to confirm, and to discharge the defendant, his heirs, &c. of all covenants entered into thereupon, &c. And the said Master is to appoint a time and place for payment of what shall appear due; upon payment whereof, it is decreed, the defendant shall re-convey the said mortgaged premises, unsold as aforesaid to the plaintiffs, or whom they shall appoint, freed of all incumbrances done by him and his father, or any claiming by, from, or under the said Peter Bevis, the defendant's said father.

The 18th of February, 17 Car. II. upon re-hearing the said cause, the said order was confirmed.

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Where a decree to foreclose the money not paid, the court in cases of inevitable necessity will enlarge the time, tho' the decree be signed and enrolled.
The decree avoided by original bill upon matter subsequent to the decree.

The LORD CHANCELLOR.

Woollet against Roberts. January 27.

At the hearing, the now plaintiffs offered a bill exhibited formerly by the defendant against the now plaintiffs in evidence, to which it was agreed the now plaintiffs had answered. The now defendants objected, that the bill ought not to be read for evidence against them, unless the plaintiffs could prove it was exhibited by the now defendant's direction or privity; for any person may file a bill in another person's name. And the court were of opinion that it should not be read, unless it were proved to have been exhibited with the privity of the party plaintiff in it. But the defendant's counsel did after admit it to be read.

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A bill in another cause no evidence against the plaintiff in it, unless it be proved to be exhibited with his privity.

Justice TIRREL.

Scwel against Freeston.

On a Plea and Demurrer.

The bill was after verdict in an action of the case. The equity was, that the defendant had writ a letter, which the plaintiffs could not prove at the trial, which would have discharged the plaintiff; and so sets forth the substance of it, and that the matter lay only in the defendant's cognizance, and ought to be answered; and that the plaintiff's witnesses were beyond the seas.

The plea was of the verdict, and that the effect of the letter was given in evidence at the trial; and demurrer was for want of equity.

A bill after a verdict in case, on suggestion of matter in defendant's cognizance, which the plaintiff could not prove at the trial.

On debate, it was insisted, that there was not any precedent of a bill in like case after verdict; but before verdict might be proper for a discovery. Payton and Humfrey's case was cited for the plaintiff: but answered, that was for matter discovered after the trial, but no such matter pretended here; and as to the allegation of the plaintiff's witnesses being beyond seas, if the plaintiff could not have them at the trial, it was answered, that upon an affidavit of that at law, the court there would have stayed the trial. And the case was referred to precedents, and after the plea and demurrer allowed.

DE TERMINO PASCHÆ.

Anno Regis 17 Car. II.

IN CANCELLARIA.

Gower against Baltinglass. May 26.

The bill was to discover a writing, which it is supposed the defendant the lady Baltinglass had concealed, she having gotten a trunk of writings by a trick from a Master of the court. The defendant had put in four insufficient answers, and delayed the plaintiff eight years; and upon the fourth insufficient answer, was ordered to be examined upon interrogatories; and now, upon motion, ordered that one of her counsel should attend in the next room when she was examined, to advise her in any matters of law if she should need it. And afterwards, on another day, ordered on debate, that her counsel should see the interrogatories, but not have a copy.

Counsel ordered to have a sight of the interrogatories to which the defendant was to be examined.

Love and others against Baker, Roll, and Clutterbuck.
May 28.

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The defendants brought a joint action at Leghorn against the plaintiffs, and had there arrested the plaintiff's goods. The defendant Baker being here, and the other defendants at Leghorn, Baker answered here, and by order a subpoena left with him was to be good service for the other defendants, and thereupon an attachment for want of an answer; and upon this an injunction was granted to stay the defendants' proceedings at Leghorn. Now, the defendants moved to dissolve the injunction, and insisted it was a new case.

A subpoena served on a defendant here, ordered to be good service for the other defendants beyond the seas.

The Lord Chancellor conceived it to be a dangerous case to stay their suit there, and so deprive them of their remedy. To which it was answered, all parties might have justice, and be fully heard in this court; but the plaintiffs would be without remedy, if the defendants proceeded at Leghorn, and got possession of their goods. And the court declared they would advise with the judges herein; and afterwards the Lord Chancellor declared, he had advised with the judges, and that they were of opinion the injunction ought to be dissolved. *Sed quare*, for all the bar was of another opinion. It was said, the injunction did not lie for foreign jurisdictions, nor out of the king's dominions. But to that it was answered, the injunction was not to the court, but to the party.

The LORD CHANCELLOR.

Smith against Pemberton. May 30.

The mortgagee had assigned the mortgage. The mortgagor comes to redeem. The question was, if what was really due to the mortgagee when he assigned, for principal and interest, and paid him by the assignee, should be taken as principal, or so much only as the mortgagee first lent?

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All money really due and paid by the assignee to the mortgagee, to be taken as principal against the mortgagor from the time of the assignment.

Ordered, that all moneys really paid by the assignee, that was due to the mortgagee, should be principal to the assignee. But the account between the mortgagee and assignee was not to conclude the mortgagor, but the master to see what was really due at the assignment, and whether he had really paid the money; for if the assignment was colorable, it would be otherwise.

The LORD CHANCELLOR.

Chief Justice BRIDGMAN.

Baron TURNER.

The MASTER OF THE ROLLS.

Lord Digby against Langworth. May 30.

Trust. Whether a recovery by tenant in tail, with remainder in tail to another shall bar the remainder.

Whether tenant in tail of a trust, remainder in tail to another; if the tenant in tail by suffering a recovery, that recovery shall bar the remainder, which is no settled interest vested.

Bridgman was of opinion it should not. But it was referred to a case, and the Judges to consider of it. See the case of Goodrick and Brown before, fol. 49.

The LORD CHANCELLOR.

Chief Justice BRIDGMAN.

Judge ARCHER.

Sherly, Esq. against Fagg. June 1.

Upon a Plea.

The plaintiff by his bill made title to the lands in question by an entail of his great-grandfather, 9 Jac. whereby the premises were limited to the great-grandfather for life, remainder to the plaintiff's grandfather by name for life, remainder to the plaintiff's father by name for life, remainder to the first son (which the plaintiff is) and other sons in tail, and shows both by virtue of those limitations the great-grand-

father, grandfather and father did enjoy during their respective lives, and the plaintiff's father died about ten years since, the plaintiff then an infant of ten years old; and that the plaintiff ought to enjoy by that settlement. And the bill complained that Sir John Fagg and the rest of the defendants had entered into several parts of the premises, and did divide the same among them, having gotten the evidences and the settlement, and did conceal the same; which the said Sir John had gotten into his hands from one Walter, for a reward to him, or otherwise; and he had altered and confounded the bounds and names of the land; and so to have a discovery of evidences, and the deed of settlement, and delivery up of the same, was the scope of the bill.

A purchaser from A. lands which B. makes title to, getting the deeds making out B's title, is not bound to discover them.
2 Chanc. Cases, 4. 133 134.

The defendant Fagg pleaded; that for 6870*l.* really paid to the Earl of Thanet, he purchased the premises of him by good conveyance at law; and demands judgment, whether he shall further discover his title, or any deeds or evidences to weaken it? and upon long debate, after a case stated, the whole court was of opinion that the plea was good.

DE TERM. SANCT. HILL.

[70]

Anno Regis 17 and 18 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.

Baker against Shelbury. February 10.

The bill being to be relieved against an apprentice, bond and articles, and to have them up. Upon hearing, ordered that the defendant do within a certain time, viz., one year, bring his action, and go to trial thereupon for his damages; or in default thereof, the bond and articles to be delivered up. And the reason that was given was, that if it were at the defendant's choice to stay his action as long as he pleased, he would stay till the plaintiff's witnesses were dead. And it was said it was usual in the case after apprentices were out of their time, to exhibit a bill to put their master to sue their covenants within a certain time, or else to deliver up their indentures.

The master ordered within a short time to sue his apprentice's indentures, or else to deliver them up.

The LORD CHANCELLOR.

Digardine against Swift. February 22.

The solicitor
to pay the
costs where
the party ab-
sents himself

Upon a motion, it was ordered, that where one of the bail at law for the plaintiff had prosecuted a suit in equity in the plaintiff's name in his absence, the plaintiff not being to be found, and the said person his bail acting throughout the cause in this court as party and solicitor, that the solicitor should pay the defendant here his costs. But this was in respect he was solicitor and prosecutor, and not as bail; for there being other persons that were bail, the court declared they would not charge them with the costs. And the Master of the Rolls, to whom this matter was formerly moved, as concerning the solicitor's paying the costs, desired to see precedents before he made any order; and declared in this case, that if there were any one precedent, he would make the second.

THE LORD CHANCELLOR.

Justice WINDHAM.

BARON TURNER.

Drake against The Mayor of Exon. February.

Commission-
ers of bank-
rupt cannot
assign a cove-
nant in a lease
to renew.

A lessor and lessee for years, the lessor covenants with the lessee and his assigns to renew, then the lessee becomes bankrupt, and commissioners of bankrupt assign this covenant. The assignee brought this bill to have the defendant, the lessor, renew to him. The case was referred to Justice Windham and Baron Turner, and they certified the plaintiff ought not to be relieved; and so he was dismissed.

Qu. Whether
they can as-
sign an equity
of redemption?

Serjeant Nudigate, who was counsel in this case for the defendant, said, it had been ruled in this court, that commissioners of bankrupt might assign an equity of redemption of a mortgage. But quære; for it seems to be against the statute, which enables them to the benefit of a condition that is performed, and not forfeited.

[72]

Money paya-
ble by the con-
dition of a
bond, mode-
rated in res-
pect of the of-
fice ut of
which it was
to issue, taken
away.

The LORD CHANCELLOR.

Judge WINDHAM.

Lawrence against Brasier.

A bond was entered into before the wars, conditioned to pay 40l. per annum for twelve years out of the profits of an

office, which was taken away by the usurpers. And the obligor being sued on the bond, and the office revived, he exhibits his bill to be relieved against the bond. The obligee insisted, that the office continued some part of the twelve years, and being now revived, the obligor ought to pay the 40*l.* per annum for twelve years, or be dismissed; for the obligee having the law with him, ought not to be hurt in equity, without satisfaction according to the condition.

It was decreed, that the obligor should pay the 40*l.* per annum for so many years as the office continued, and thereupon the bond to be delivered up.

DE TERMINO PASCHÆ.

[73]

Anno Regis 18 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.
Baron Turner.

Terwit against Gresham. March.

Ordered upon long debate, that depositions of witnesses taken in a former cause thirty years since, where the same matters were under examination and in issue as in this, (the point being concerning incumbrances and dampnification in both cases) should be made use of in this cause, albeit the plaintiff in this cause, and those under whom he claims, were not any parties in the former cause, inasmuch as the tertenants were then parties, and the now plaintiff's title did not then appear, and the witnesses were dead. And precedents were cited for this between Trinity Hall and Doctors Commons, where Dr. North's depositions taken in a former ancient cause, where neither of the now parties were party, was read. And the like between Culton and Vaughan.

Dispositions in a former cause between other parties, read against one that claims not under any of these parties.
Post 175, 236. 238.
Kelw. 96. a. b. Hard. 180.
Ant. 25. Post. 229. Kelw. 100. a.

The LORD CHANCELLOR.

[74]

Armitage against Metcalf. May 16.

The cause being heard about 1664, and one point being, Where the that the obligor having paid a debt of his ancestor's upon heir being

forced to pay the debt of his ancestor, shall recover against the executor.

bond, might be reimbursed his money by the executor of the obligor, who had personal assets, the heir being forced to pay the debt by a suit, it was decreed the executor should reimburse the heir as far as there were personal assets come to the executor's hand. And upon exception taken to a report in this cause, which came to be heard before Mr. Baron Atkins, 29 Jun. 1668, there was this point: Whereas A. alone was bound to the testator, the executor delivered up the bond, and took another to himself for the same debt, whereby, as was alleged by the counsel of the executor, the security was bettered; and whether this in equity should be charged as assets in the executor's hands, he having delivered up the old bond? was the question.

Where the delivering up of a bond by the executor, and taking a new bond to himself for the debt, is no conversion in equity to charge the executor with the payment of that money.

Against the executor it was insisted, that the taking the new bond had altered the property of the debt, so that if the executor died intestate, his administrator would have the debt; whereas if it had rested on the old bond, the administrator *de bonis non* of the first testator should have it subject to the first testator's debts. It was admitted that at law, this did charge the executor as a conversion and receipt of so much of the estate. But it was insisted, that in equity he having taken the same person, and another bound, and offering to assign the bond to the heir, it ought not to charge him, especially when the heir is plaintiff in equity, as here. And it was ruled, that the executor should not be charged with the money by altering the security, but that he should assign the security to the heir.

[75]

The LORD CHANCELLOR.
The MASTER OF THE ROLLS.

Smallpiece against Anguish. May 25.

Injunction to debtors to a testator's estate not to pay any money to a pretended executor, till his title to the executorship were settled in the spiritual court.

The bill suggested, that the defendant did endeavour to set up a will, pretended to be made by one that died in the great sickness in London, and that the defendant was executor of it: whereas there was no such real will, but obtained unduly, and that it was contested in the spiritual court; and yet the defendant in the interim being insolvent, endeavoured to get in the debts due to the estate. The defendant demurred, for that the bill contained no equity, and the suggestion of insolvency might be made against every executor. But the demurrer was overruled; and upon motion it was ordered, that the debtors to the deceased's estate should forbear to pay any money till the matter settled in the spiritual court.

And note, that upon examination this was found to be a forged will, and the defendant stood in the pillory for it.

DE TERM. SANCT. MICH.

Anno Regis 18 Car. II.

IN CANCELLARIA.

In Court. The MASTER OF THE ROLLS.

Knife against Jesson. November 13.

The defendant employed the plaintiff as his factor beyond sea, and brought an action of account against the plaintiff here at law, and had judgment *quod computet*. The plaintiff brought his bill here to have an allowance upon account for what he had saved in not paying the customs for those goods (which could not be allowed before the auditor, as was said;) and an allowance was decreed to the plaintiff for the same against the defendant the employer; and so it was referred to a Master to take the account. Vide Smith and Oxenden, f. 25. and Borr against Vandaleff. 30.

The factor (not the employer) to have the benefit of stolen customs.

Hampden against Brewer. November 19.

[77]

On a Demurrer.

Richard Hampden made the plaintiff and his widow executors, under this condition, that if the widow married, her executorship to cease, and the plaintiff to be sole executor. The plaintiff and the widow exhibited the bill, to which the defendant answered, and several orders were made (*inter alia*) by consent to refer matters finally to be determined. Then the widow married, and it became a question in this case, whether the plaintiff might proceed upon that bill, (wherein there was no mention that the widow's executorship was conditional, but the bill was by both as executors general,) or whether he must bring a bill of revivor? and upon a reference of that point to Chief Justice *Bridgman*, he was of opinion he must bring a bill of revivor; though Serjeant *Fountain*, upon producing the will under seal, whereby it appeared the widow's executorship was conditional, *ut supra*, did insist, that there was no need of revivor. This was the result of the former debates.

Two executors (the one conditional) are parties; the condition is broken, the other executor must revive.

A bill of revivor was brought, which was to revive all the former proceedings, and particularly the order by consent. The defendant did demur to the bill, for that it sought to revive the order, whereas the feme was a party to it; and

Demurrer, because more was prayed to be revived than can be.

she being married since her executorship, consequently her consent was determined. And upon debate (which was the only work of this day,) the demurrer was allowed.

IN COURT. THE MASTER OF THE ROLLS.

Uuderwood against Staney. November 24.

Obligee in a bond lost, hath remedy against the surety in equity.

[78]

Post. 126.
Latch. 24, 146.

The obligee in a bond of twenty years old, exhibits his bill against the administrator of the principal and the surety (upon loss of his bond.) The administrator saith by his answer, that he hath no assets. Upon hearing the cause, it was directed to a trial, whether the surety had sealed and delivered the bond; and a verdict had passed against the surety, (viz.) that he had sealed and entered into the bond. And the cause coming back to this court, and the plaintiff's counsel praying a decree for the plaintiff's debt against the surety, Serjeant *Fountain* (not of counsel on either side) said it was doubtful whether equity should in this case bind the surety, who was not obliged in law, but in respect of the lien of the bond; and that being lost, and the surety having no benefit by (nor consideration for) being bound, he thought equity after so long a time should not charge the surety. The master of the Rolls said he would see to moderate and mediate this matter between the parties; in order to which, he was several times attended by the plaintiff; and the defendant making default, he decreed for the plaintiff. And afterwards the cause was upon a case made, brought before my Lord Chancellor, who was of opinion with the Master of the Rolls, and decreed it for the plaintiff.

Obligee in a voluntary bond lost, hath remedy in equity.

Loss as good a consideration of promise, as profit.

It was in the debate of this case said, that if a grantee in a voluntary deed, or an obligee in a voluntary bond, lose the deed or bond, they should have remedy against the grantor or obligor in equity. *Tamen quere.* But if so, no mistake in the principal case, where the bond was for money lent; and though the surety had no advantage, yet the obligee had parted with his money, and loss is as good a consideration for a promise, as benefit or profit.

DE TERM. SANCT. HILL.

Anno Regis 18 & 19 Car. II.

IN CANCELLARIA.

In Court. The MASTER OF THE ROLLS.

Dr. Thorndike against Allington. January 26.

A demise was to the plaintiff by the defendant's father (whose son and heir the defendant was) of 20*l.* per annum out of a Rectory, with a clause of distress for non-payment.

The glebe belonging to the Rectory was but of 40*s.* per annum, and the tythe not being subject at law to a distress, and so no sufficient remedy at law for the rent, thereupon the plaintiff brought his bill to have the whole rectory liable to the rent, and the defendant decreed to pay it. On the defendant's part it was insisted, that this court ought not to extend a remedy beyond what the deviser appointed, and the plaintiff must take such remedy as by law he might. To which the plaintiff's counsel replied, that the deviser gave the annuity out of the whole rectory, and intended the tythe as well as the glebe should be liable to it; and that in case of a rent-seck, where the grantee had no seisin, this court had frequently given release by decree here. But the defendant's counsel insisted, that that was not like this case, because in that case there was no remedy at law at all.

The court decreed, that the whole rectory be liable to pay the annuity, and that the defendant do pay the arrears and costs.

Remedy in equity for a rent, where the remedy at law is not sufficient.
Moor. 805.
Pl. 1092.
Litch. 146.
4 Leon. 184.
Post. 147. 125

Rent-seck without seisin recoverable in equity.

[80]

The person made liable to the arrears of rent with which he was not chargeable at law.

The MASTER OF THE ROLLS.

Beversham against Springhold. February 11.

A perpetual injunction awarded against the defendant not to prove a will touching a personal estate only in the prerogative court.

But note, that in this case it was directed by this court to be tried at law, whether a will or no; and found against the will; and then this injunction was awarded.

Injunction not to prove a will in the spiritual court.

The LORD CHANCELLOR.

*Gilpen against Smith Knight, and Dame Dorothy his wife,
and Zouch.*

Upon a re-hearing before the Lord Chancellor, Sir Edward Zouch seized in fee of lands, settled them on trustees after his death for payment of his debts, and dies, leaving the defendant Louch his son and heir, an infant, and the defendant Dame Dorothy his widow: she entered upon the lands, and taketh the profits, (the trustees not at all acting) then she marries Lloyd. After the marriage, he continues to take profits during his life, as she had before. He dies; then the defendant Sir Smith intermarries with Dame Dorothy, and she being in receipt of the profits till that time, the defendant Smith continued to receive the rents until the defendant Zouch came of age. The plaintiff was a creditor of Sir Edward Zouch, and his bill was against the heir of Sir Smith and his wife, and the trustees to have his debt paid.

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This cause being first heard at the Rolls, it was there decreed, that the plaintiff's debt should be paid, and that both the lands and Smith (in respect of the profits taken by Dame Dorothy, and Lloyd and himself) should be liable to the payment thereof; with this, that if it fell on the heir to pay the debt, he should have the benefit of the decree to reimburse him against Sir Smith, so far as the profits taken by Dame Dorothy, Lloyd and Smith did extend.

Whether the
2d. husband
be answerable
for profits of
land wrong-
fully taken by
the wife, dum-
sola, and af-
ter by her
former hus-
band during
their cover-
ture.

From this decree Sir Smith and his wife appealed. And for Sir Smith it was insisted, that he ought not to be charged with the profits taken by the lady, or Lloyd her former husband; and farther, that she had assets of Lloyd's estate, to whom she was executrix.

The argument on Sir Smith's part was thus: either the profits taken by the lady and Lloyd were taken by right (for there was a pretence she entered on the lands as part of her jointure) or by wrong; if by wrong, then Lloyd the wrong-doer being dead, the tort was dead with him, and so there was no remedy to be answered for that wrong; and compared this case to a trespasser, and the trespasser dead. If by right, then not answerable over for them.

Serjeant *Maynard* for the heir insisted, that both by law and equity Sir Smith and the lady were answerable for the profits taken by the lady, and after by Lloyd; as if me, tenant pur vie, marry, and the husband doth waste and

dies, waste lies against the wife. And compared it to the case where a feme executrix takes a husband that wastes the testator's estate, a devastavit lies against the feme after the husband's death for the waste of the husband. And the feme, by her entering and meddling, had made herself liable to answer what she had took as a debt; and Lloyd her husband, upon his marriage, continuing to take the profits as she did, it is a continuance of the wrong she did, and by colour of her having entered before and taking the profits, made her liable for her own receipts, as a debt owing by her. And her marriage with Lloyd, which is her own act, cannot discharge herself; and the husband must be looked upon as acting in this case, by reason of the wife's so acting before. And so, upon the whole matter, the court conceived the decree just, and that Sir Smith must take his wife chargeable with this debt. But upon the proof that the mother and the son were related to the Earl of Anglesey, it was referred to him to moderate the matter if he could; if not, then directed a case to be made.

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DE TERMINO PASCHÆ.

[83]

Anno Regis 19 Car. II.

IN CANCELLARIA.

The LORD CHANCELLOR.

The MASTER OF THE ROLLS.

Sir John Harrison against the Lord North, Executor of the Lady Mountague. April 25.

The plaintiff was tenant to the lady Mountague of a house in London, at a certain rent: he left the house, and went to Oxon to the late king, and then sent his servant with the key of the house to the lady, and desired her to re-enter and accept the surrender. She said she would advise with the defendant her son-in-law, (who then set in the house of commons, and acted with them;) afterwards she refused to accept of a surrender. The house was made an hospital by the parliament for maimed soldiers. The defendant, as executor to the lady, brought debt at law against the plaintiff for rent incurred while the house was so used, and all the time. To be relieved against which action was the scope of the bill.

Finch p. Quer. It is but reasonable, that if a tenant be put out by such against whom he can have his remedy over, that he notwithstanding be liable to pay his rent to the lessor. But here the plaintiff hath no remedy over; and it was an act of force in the parliament, which is pardoned by the act of oblivion, and so no remedy over, and the king hath pardoned all his arrears of rent. The law of England is *ex vi termini*, stricter in the matter of rents than other nations; for *redditus* and *reddere* is accepted as *restituere*, and render implies *apprendre*.

Whether tenants held out by force by soldiers in time of rebellion shall for the time be relieved in equity against payment of his rent. *Equitas sequitur legem. Carter and Cummins' case.*

Maynard, for the defendant. The plaintiff hath a pitiful case; but not such as this court can relieve; for the law and equity is all one in this case; and if the latter be no good bar at law, it is not good in equity. And he insisted, that if rebels, the king's own subjects, do an act of force, and hold a tenant out, that is no equity to excuse him from payment of his rent; and cited the case of Carter and Cummins about two years since in this court, where the plaintiff being a tenant of a wharf, which by an extraordinary flood was carried all away, brought his bill to be relieved against paying of his rent; but all the relief he had was only against the penalty of the bond, which was broken for nonpayment of the rent; and the defendant ordered only to bring debt for his rent. And he insisted, that a surrender of lands is no cause for apportionment of rent, which is stronger than the principal case. The Lord Chancellor took time to advise; but declared, if he could, he would relieve the plaintiff.

Frank against Frank. May 17.

[85]

A man seized in tail of freehold lands, with remainder to his older brother, and of copyhold lands in fee, deviseth his lands to his younger brother, and the copyhold lands to his elder brother, and dies. The devisees agree by writing under their hands, that the lands should be enjoyed by them respectively accordingly; and to draw on this agreement, the younger brother pretends the devisor did suffer a recovery of the freehold lands, and produceth an exemplification of a recovery. Upon search, it was found there was a writ of entry brought, and a warrant of attorney to appear was entered; so that had the party that suffered the recovery been living, he might have perfected the recovery; but there is no recovery of record. The elder brother being informed there was no recovery upon record, and so the devisor could not devise the freehold lands from him, and he being in truth entitled to the

copyhold as heir at law, and not by the will, no surrender being made to the use of it, brought his action at law to recover the freehold lands. The younger brother exhibits his bill upon the agreement, and pretends there was a recovery, howbeit the record was embezzled, and prays he may hold according to the agreement between him and his brother.

And upon hearing at the rolls, it was decreed, that he should enjoy the freehold land, and an injunction awarded to stay the elder brother's suit.

From this decree the elder brother appealed by bill of review, and upon hearing of the bill of review, it was insisted for the plaintiff therein, that the agreement between the two brothers was *parol* only, and that the pretence of a recovery was a fraud, there being none; and that if there was an intention, and it was never executed, that intention can never found a decree against the statute *de-donis*; and that the agreement doth not alter the case, it being introduced by fraud, there being in truth no recovery, nor no surrender of the copyhold to the use of the will. So that the plaintiff in a bill of review ought to have both freehold and copyhold.

Maynard for the decree. The question is not, whether the recovery shall bar or not? but, whether here is not enough to fortify and execute the agreement? He insisted farther, that the plaintiff had departed from his title to the freehold lands; and though the agreement was not sealed, yet it was under hand, so that the certainty of it was not to be disputed; and so relied upon the agreement, and that in that respect the decree was well grounded, and thereupon the bill of review was dismissed with costs; for *modus and conventio vincunt legem*. So that in this case the agreement of the party, upon conceit he had not (when in truth he had) a title to permit another to enjoy lands, shall for ever bind him; and yet this agreement doth appear to be upon no valuable consideration.

Where an agreement, though conceived upon mistake, shall bind the party.

[86]
Hard. 200.
204. Post 223,
240.

In Court. *The Master of the Rolls, in the absence of the Chancellor.*

Colwel against Sir William Child, a Master of this Court.

All parties to a suit here consent to refer the whole matter to Serjeant Maynard, finally to be heard and determined; and old Child, the now defendant's father, signified his consent by subscribing a paper for that purpose, so as the award was made by a certain day limited in this paper. That elapsed, and then the court in presence of all parties but old Child, (who was then absent) by the assent of his Solicitor re-

Rep. Chanc.
Part 1. 195.

ferred it back to Serjeant *Maynard*; but it was not inferred in the order that he should finally determine. Upon this, Serjeant *Maynard* made an award, which was afterwards decreed, unless cause shown. Old Child showed for cause, that he did not consent; and his solicitor made oath he did not consent Serjeant *Maynard* should finally determine; yet the award was decreed. Whereupon a bill of review was brought, and error assigned; and upon the hearing of this bill of review, it was insisted, that the matter of Old Child's dissent was *dehors*, and not contained in the decree. And it was said, the court could not take notice of that, inasmuch as there did not appear any dissent in the decree itself.

Errors in law.
Error 1.

Solicitors assenting to interlocutories may bind, but not to final reference.

[87]

Award set aside, for that the party did not actually assent unto the reference.

2 Error.
Award erroneous, for that it is but of part of the matters referred.

3 Error.
Decree impossible.

4. Error.
Decree repugnant.

First error assigned was, that the assent of the Solicitor shall not bind the party. Against which it was objected, that Solicitors are here as attorneys at law. And if an attorney confess judgment, the party is bound by it; and that usually Solicitors are looked upon here as attorneys at law; as for instance, in a Master's report made in the presence of Solicitors. But it was answered and resolved by the court, that although Solicitors assent to interlocutories may bind, yet it cannot bind to a reference finally to determine. And it was said and admitted, that an attorney's assent to an award shall bind his client. And this error was declared by the court to be good cause of reversal. And it was declared it should not lie upon the plaintiff to show Old Child's dissent; for it appears upon the decree, that it was the Solicitor's assent; and if the decree want a sufficient foundation, it is error, and the plaintiff shall not be put to show a negative. And the plaintiff's counsel cited a case between Brooks and Dickens, about 1652, where an award was set aside for that the party did not actually assent to the reference, and yet attended the reference in the business.

For that the award was but for parcel of the matter in controversy, and not of the whole matter, whereof the reference was to determine. And this error allowed.

For that the decree was impossible; for by the award (decreed) Old Child was to pay a sum of money 24 Jan. 1654. or surrender an estate; and the decree was dated after the said 24 Jan. 1654, and so impossible. And this was allowed to be error.

For that the award was repugnant; for it awarded Old Child to deliver up an obligation of 800*l.* in satisfaction of 400*l.* of 1000*l.* which he was to pay, and to vacate a suit in

satisfaction of 600*l.* residue of the said 1000*l.* although there was not any residue after the 400*l.* and 600*l.* satisfied. And this was ruled to be for error also. And so the decree was reversed.

Then it was moved, that the Solicitor who assented, and who was now Solicitor in this present cause, should pay costs to the defendant Dr. Child : but resolved he should not ; for that the assent he gave was in court, and the court knew such assent would not bind the party, and it was the folly of the other party to proceed on that assent.

The MASTER OF THE ROLLS.

[88]

Smith against Smoult. January 21.

The question was, whether the mortgage money should be paid to the heir or executor of the mortgagee? and it was for the heir insisted, that it was ruled in a case between Tilley and Egerton in Michaelmas 1660, heard by the Lord Chancellor, assisted by the Lord Bridgman, there being no defect of assets in the executor's hands, that the heir should have the money, who is to convey the estate. And this was said to be the first precedent of this kind. The court will see precedents.

Whether the mortgage money belongs to the heir or executor of the mortgagee.

And afterwards, about Michaelmas or Hillary Term, 1667, the principal case was heard before the Lord Keeper Bridgman, where the order in the case of Egerton was produced ; but in the principal case there appeared to be a bond for payment of the mortgage money, which goes to the executors ; and the condition of the redemption was upon payment of the money to the executors, &c. (without naming the heir.) So it was ruled in the principal case, that the money should be paid to the executor. But the Lord Keeper said, that if the condition of the redemption had been to pay the money to the heir or executor, and no bond were in the case, nor no want of assets of the personal estate, it might have been otherwise. And in the case of Egerton, in reading the order it did not appear how the condition was penned ; but the court now took it that the money was payable to the heir by the condition. Saint John against Grabham, 11 Car. I. adjudged by the Lord Keeper, that the heir, and not the executor, should have the money, being payable by the condition to the heirs or assigns of the mortgagee.

DE TERM. SANCT. TRIN.

Anno Regis 19 Car. II.

IN CANCELLARIA.

Elston Wallis and others, Executors of Anne Smith, against Sir Thomas Crimes, Baronet, John Scot, Esq. and others. June 4.

In 1656, Sir George Crimes, father of the defendant Sir Thomas, and whose eldest son the defendant Sir Thomas was, demised the lands in question to Anne Smith for 2000*l.* for 2000 years by way of mortgage, Sir George then being in possession, and taken to be the absolute owner.

The 19 of January, 1643. Sir Thomas Crimes, father of Sir George, had conveyed the premises to the defendant, Scot and others, and their heirs, upon trust, that if Sir George, within six months after his father's death, secured to the trustees 500*l.* for the benefit of Sir George's younger children, then (after such security first given to the trustees) to convey the premises to Sir George and his heirs as he should appoint: and till the time limited for giving the security, the trustees to stand seized to the use of Sir George's eldest son (which Sir Thomas is) for his maintenance; and in default of such security, the trustees, at the request of Sir George's eldest son, to convey to him. This appearing to be the case in proof upon a bill exhibited by the plaintiffs to enforce a redemption, or to hold discharged of equity, the court decreed that the plaintiffs do hold and enjoy the premises for security of the 2000*l.* with interest, against the defendants and all claiming under them, charged with the 500*l.* to Sir George Crime's younger children from the time the plaintiff came into possession, and that the defendants do accordingly execute conveyances, unless the defendant Sir Thomas Crimes do pay the mortgage money and interest by a day.

The defendant brought a bill of review to reverse this decree; and for error showed, that in default of giving security in six months after Sir Thomas's death, the trustees were to convey to the defendant and his heirs; and the security was first to be given, before Sir George was to have any thing in the lands; and that Sir George being dead, that was impossible, he having not given any security.

But upon debate of the matter, upon an answer put into the bill of review, and hearing of the cause before the Lord Keeper *Bridgman*, 28 Oct. 1668, he declared he saw no cause to

1 Mod. 307.

A breach of a condition precedent relieved in equity as in the nature of a penalty.

reverse the decree, but looked upon the condition precedent to be in the nature of a penalty, and would regard the intent of the trust, which was to secure 500*l.* to the younger children, which, with the way the plaintiffs went in this bill of review, could not be. And so dismissed the bill of review.

DE TERM. SANCT. MICH.

[91]

Anno Regis 19 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

Hide against Pettit. October 25.

There having been a decree in this case for a personal duty, and a sequestration awarded against the defendant's real and personal estate by the late Lord Chancellor, assisted by Baron *Turner* : it was now moved by the defendant's counsel against this sequestration, and insisted, that this court did not anciently grant any sequestration but sparingly, and that only of the thing in demand ; and that the sequestration in this case took more than all the executions at law ; and that sequestrations had been extended so far of late, as to sequester things in action, which no execution at common law can reach, and the consequence of which would be destructive to trade and commerce. And besides, when any purchaser is brought into this court upon the process of sequestration upon sequestration, that this purchase is subsequent to the sequestration, or for other reason bound thereby, whereas many persons so brought in are really purchasers, or have other good titles, which neither are nor ought to be bound thereby, those persons so brought in are looked upon as contemnors and delinquents, and forced to answer interrogatories blindfold, without having a copy of them, or liberty to show them to counsel ; by which means persons coming into this court to defend their interest, are often through their own unskilfulness concluded in their just rights, even against right, to the great dishonor of the court and of justice. But to maintain the sequestration, it was insisted by *Fountain*, that they were very ancient in this court, and cited a case, 17 Jac. *Zacheverel* against *Zacheverel*, where a sequestration was awarded both against lands and goods, and the

Argument pro
and contra,
sequestration.

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Sequestration
against lands
and goods.

The power of
the chancery.

thing decreed was a personal duty; and this sequestration was awarded by the court, assisted with the judges, upon view of four precedents. *Russel against Read*: The defendant being in the fleet, the money decreed was sequestered, it being in the fleet; this in the *Lord Coventry's* time. And 18 Feb. 1662, assisted with Baron *Turner* in this principal case, and the case of *Bedingfield and Zouch*, that a sequestration should be the usual process of this court, and the course of the court is the law of the land, and an executor might bring an action here before the statute gave it. And it was urged, if you should take away sequestration, the justice of the court would be elusory; and that after a suitor had been at great charges in obtaining a decree, if the defendant would lie in prison, there would be no remedy for the plaintiff to come by the fruit of his decree; and the remedy by imprisonment would be ineffectual; for if he go abroad, no escape lies. Upon a judgment in a court baron, a *levari fac'* goes, which takes all the profits of the lands, and a statute before a mayor takes all. And therefore not unreasonable that so great a court as this should have an effectual means of bringing suitors to the fruit of their suit, which without a sequestration cannot be done.

And as to sequestering things in action, there is no such thing sequestered in this case. And as to the danger of bringing persons that came in for their interest as delinquents, by means of sequestration, and their being deprived of counsel to answer; that is the case of every decree and contempt where there is no sequestration, and is the course there as well as in the course of sequestrations.

[93]
Sequestration
against lands
and goods well
awarded.

The court will see precedents; and after, at another time, declared, it was satisfied the sequestration in the principal case was well awarded, and that sequestrations were a necessary process of this court.

THE LORD KEEPER.

Sir Henry Henn against Sir Henry Conisby. October 25.

Money of the defendant's was lent out by one *Yarway* to the plaintiff, upon the security of a mortgage and recognizance, and the security was taken in one *Campbel's* name in trust for the defendant. The money was lent 1659, and paid in to *Yarway* in 1663, and all interest for the same; and *Yarway* during that time and a year after paid the interest to the defendant, but the defendant himself kept the security. *Yarway* failed, and the question was, whether the payment of the money to *Yarway* (who had not paid it over to the

defendant) should be taken as a good payment to conclude the defendant.

For the plaintiff, it was laid down by his counsel as a rule, that where one places money in a scrivener's hands with this general trust, for him to put it out where he pleaseth, there by that general trust or authority the payment back to the scrivener is good payment.

And it was proved by witnesses, that the defendant had said, he had trusted Yarway with the greatest part of his estate, and he feared he should be cozened; which the plaintiff's counsel insisted on as evidence to prove that the defendant trusted Yarway with his money; but as to that, it

was answered by the defendant's counsel, that Conisby lent Yarway other moneys on his own security, which he lost, so might say he was like to be cozened by the said Yarway. But it was farther insisted by the defendant's counsel, that the defendant kept the security himself, which clearly showed tha. Yarway did not act under such general authority as was alleged by the plaintiff's counsel. And it was insisted, that that one circumstance would rule the case; and no man will pay the money due upon a mortgage and recognizance (no, not on a bond) without having the security up; and the payment of the money by the plaintiff to the scrivener without having up his security, was an evidence that he did trust the scrivener more than the defendant did, (who always kept the security himself) and he that trusted most is to be cozened.

Whether money paid by the borrower to the scrivener that is employed in lending of the money, without taking up the security, be a good payment to conclude the lenders.

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A case between sir Gilbert Gerrard and Baker was cited by the defendant's counsel, where money was paid to one that did usually receive for the obligee, yet the obligee not trusting the receiver with the bond, it was held no good payment.

A case between sir Gilbert Gerrard and Baker was cited by the defendant's counsel, where money was paid to one that did usually receive for the obligee, yet the obligee not trusting the receiver with the bond, it was held no good payment.

The court conceives the case is against the plaintiff, in regard the defendant kept the security, but will see precedents; English against Lee, a precedent cited by the plaintiff in 1655. And after the court had perused the precedents on both sides, Pasch. 1668, judgment was given for the defendant, that the payment to the scrivener should not conclude him: but he was ordered to take the principal without costs.

DE TERM. SANCT. HILL.

Anno Regis 19 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

Mary Thomas, widow, against Edward Porter, Phineas Porter, and Robert Bishop, of Worcester. February 8.

The plaintiff was tenant *durante viduitate* of the lands in question, being copyhold of a manor whereof the defendant the Bishop was lord, remainder to Edward Porter. The plaintiff had felled trees, which at a court-baron was presented, and found a waste, and consequently a forfeiture by the homage; and the defendant Edward was afterwards at another court, after an entry made by the Bishop for forfeiture, admitted, and brought ejectment, and before a judge of assize had a verdict.

To be relieved against which was the bill, which did suggest, that the timber that was cut was worth but 40s. and the estate 60l. per annum, and that there was 300l. worth of timber standing; and that if upon examination it should appear to be waste, the plaintiff would make satisfaction.

[96] The defendant Porter, by answer insisted, that the waste was voluntary, and declared to be so by the judge of assize before whom the judgment was; and that the timber felled was worth 60l. Upon the proofs there was a great difference touching the value of the timber felled, and some proof of a load or two of boards that were carried off the premises by the plaintiff, which for her was insisted were carried to another copyhold within the same manor; but there was not any proof that the plaintiff had sold any of the timber she felled; and it was proved the copyhold in question was much out of repair, and for the plaintiff insisted, that with that timber she intended to repair the same.

The Lord Keeper. It was not clear there was any wilful forfeiture, for that the defendants, before the plaintiffs had applied the timber, took advantage of the forfeiture, and the defendants were ever forward therein; and yet withal declared, that in case of a wilful forfeiture he would not relieve; and then referred the cause to the Bishop, the defendant, to be chancellor in this cause.

Upon this, the Bishop certified the waste to be wilful, and no ground to relieve the plaintiff.

Upon this certificate, the cause coming to be heard before

justice Tyrrel (in absence of the Keeper) he pronounced an order to dismiss the bill; which being stayed by a petition to the Lord Keeper, 11th November, 1668, he re-heard the cause; at which time it was insisted for the plaintiff, that the Lord Keeper could not delegate his jurisdiction to the Bishop, as the order on the first hearing did mention; which was admitted; and it was made out by affidavits, that the Bishop's son had taken a bond from the defendant Porter for 50*l.* if the cause went for the defendant Porter.

Upon this hearing, it was referred to a trial at law upon this issue, whether the primary intention in felling the timber was to do waste? but as the order was drawn up, the issue to be tried was, whether the supposed waste was wilful or not? A forfeiture of a copyhold by felling of timber relieved in equity.

And upon two several trials it was found for the plaintiff; and so after these two trials, it was decreed, the plaintiff should be relieved, and the defendant to deliver possession, and account for the mesne profits.

IN COURT, THE MASTER OF THE ROLLS.

[97]

*Saint John, Esq. against Molford, Baronet, and others.
February 9.*

The defendant's grandfather (whose heir and executor the defendant is) became bound with the plaintiff's father, (whose heir the plaintiff is) in several bonds, as his surety for 4000*l.* The plaintiff's father conveyed the manor of Colwerton by way of mortgage to the defendant's grandfather, to counter-secure him against the said bonds for 4000*l.* The plaintiff's father prevailed with the defendant's father to become bound with him afterwards for 2000*l.* more. Then the plaintiff's father paid off 1500*l.* of the 4000*l.* debts by bond. 2 Chanc. Cas. 194, 195.

The bill was, to be admitted to redeem upon payment of what the defendant's grandfather or himself had paid off or been dampnified by the bonds for the 4000*l.* and what remained unpaid of the 4000*l.* And the question was, whether the plaintiff (inasmuch as there was no agreement proved that the mortgage was to be a security to the defendant's grandfather against the bonds for the 2000*l.* as well as those for 4000*l.*) should be admitted to redeem upon payment of the 4000*l.* without the 2000*l.* And it was ruled, and so decreed, that if the plaintiff would redeem, he should reimburse and save harmless the defendant as well touching the 2000*l.* as the 4000*l.* upon this rule; he that will have equity to help where the law cannot, shall do equity to the same party against whom he seeks to be relieved in equity. Counter-security given against one debt shall extend to be security against another debt.

He that will have equity must do equity.

Serjeants *Maynard* and *Fountain* were of counsel in this case with the plaintiff, and did without any debate rest in this order. Serjeant *Fountain* said, it was a just decree.

Hill. 1667, upon an appeal to the Lord Keeper *Bridgman*, the decree was confirmed.

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Gore against *Blake*.Rep. Chanc.
263.

The case being stated by order, came this day to be determined; and in effect it was thus: A. by his will, whereof he makes B. his executor, deviseth (*inter alia*) that B. shall take the rents and profits of his lands of inheritance for fifteen years, in trust to pay his debts, and upon other trusts; and after several particular legacies, bequeaths all the residue of his goods and chattels to B. his executor. It falls out that all the debts are paid, and all the trusts performed, and there is an overplus of the fifteen years besides what was sufficient to pay the same.

Whether the overplus of the profits of a term devised out of an inheritance in trust to pay debts to the executor who is residuary legatee doth belong to the heir or executor.

The question was between the heir and the executor of B. who shall have the remainder of the fifteen years after the debts paid, and trusts performed. For the heir it was said, there was a difference between this term, being out of the inheritance, and a bare chattel; and that the overplus of this term being out of the inheritance, should attend it; and there was not any intention in the testator to give the executor the profits for fifteen years, otherwise than to make provision for payment of his debts, and those other trusts; and that the end being satisfied, the residue of the term did cease, and return to the inheritance. But for the executor it was insisted, that the fifteen years was a term, and then the devise of the residue of the goods and chattels did pass.

Curia. The term is in the devisee, and there passed an interest; and if it had been devised, the executor should take the profits for fifteen years; and then the appointing the debts to be out of the profits, and the other trusts doth not alter it, so conceives the residue of the term belongs to the executor, and not to the heir; and so decreed. *Tamen quere*.

[99]

Sir Joseph Douglass and his wife against *William Waad*.

James Waad, the defendant's father, having married a first wife, did in her lifetime, many years before her death, by several fines and deeds settle the several manors of *Buttles* and *Payton-Hall*, to the use of himself for life, remainder to his first and all his other sons in tail. Afterwards the

first wife dies without issue; then James Waad marries with the daughter of Eltonhead: but before marriage agrees with Eltonhead, that in consideration of 1000*l.* portion, which Eltonhead was to pay her, to settle her a jointure of 300*l.* per annum, (of which it appeared in the case *Buttles Manor* was to be part) but what the other lands were that were to make up the 300*l.* per annum, did not appear. James Waad hath issue by his second wife the defendant, and died, leaving the second wife, who married *Douglasse* the plaintiff.

Their bill is against the defendant, to have him decreed to settle the jointure on the defendant's mother, and to set aside the settlement made by James Waad against the jointress as fraudulent.

When this case was first brought to hearing, there was no proof of payment of the 1000*l.* portion by Eltonhead; but it proved that Eltonhead maintained James Waad, and furnished him with money for other uses.

And it was insisted on the plaintiff's part, that marriage was a good consideration to make the jointress a purchaser; and it was her father that was to pay the 1000*l.*, and not she, and so she was clearly a purchaser. If a man secure his purchase money, it is payment. And to this opinion that she was a purchaser, the Lord Chancellor inclined. And the plaintiff's counsel, Serjeants *Maynard* and *Fountain*, insisted, that the jointress being a purchaser, the settlement being after the marriage of the first wife, was fraudulent as to the jointure, which the second wife claims by the marriage agreement.

On the defendant's part it was insisted, the first conveyance was good, and cannot be set aside by the marriage agreement: for it was not in the power of the father after the first settlement to avoid it, and every voluntary conveyance is not fraudulent. The Chancellor of Oxford's case, *Merry and Littleton's case*, 10 Jac. Fraud is not to be presumed. And this conveyance was by fine, and so notorious and upon record, and there could not be any intention of fraud as against the second wife; and it is rare that this court takes upon them to judge a deed fraudulent.

To which it was replied, fraud is only cognizable here, and was only proper here before the statutes; and every voluntary conveyance is presumed to be fraudulent, unless he that claims by it can prove the contrary.

The Lord Chancellor inclines, the jointress is a purchaser; and whether the deed be fraudulent, proposes to have it tried; but after referred it to a case. And a case being stated to the effect *ut supra*, with this move, that there was a release given by James Waad for the portion, 25 Feb. 19 Car. II. the

Marriage a good consideration to make a feme a purchaser. Security of purchase money is payment.

[100]

Every voluntary conveyance is not fraudulent

But prima facie, it is presumed to be fraudulent.

cause came to be heard before the Lord Chancellor and Baron *Turner*.

A voluntary conveyance precedent as to a marriage agreement subsequent is fraudulent.

At which time the court declared the marriage was a good consideration to make the feme a purchaser; and besides, upon the release for the portion, it was clear she was a good purchaser, and that all voluntary conveyances are *prima facie* to be looked upon as fraudulent against purchasers, unless the contrary be made appear; and so decreed the settlement by James Waad to be set aside as fraudulent.

The defendant brought a bill of review, and assigned for error, that it was not cognizable here whether a deed were fraudulent, but that was only triable at law; and besides, no color of fraud against the jointress; for the deed, as appears by the decree, was made in the life of the first wife, who lived ten years after, and the second wife not then thought on. And the settlement being by deed and fine, ought not to be presumed fraudulent without proof. And it was farther assigned for error, that by the decree the settlement as to Payton Hall was to be part of the jointure; and she was not, as appeared, any purchaser as to that; and so no reason to set aside the settlement as to Payton Hall, under the notion of the jointress being a purchaser, for that it did not appear that that was within her pretended purchase.

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To this bill of review the defendants demurred, and insisted that the decree was well grounded; and upon debate thereof before the Lord Chancellor and Baron *Turner* in Trinity vacation, 19 Car. II. the demurrer, as to the points above, was allowed.

But as to another particular, touching the mesne profits (which point I have not stated) the plaintiff in the bill of review was, upon arguing of the demurrer, relieved, and the decree so far explained (that is to say) whereas by the decree the defendant was to answer, and pay all the arrears of the 300*l.* per annum to the jointress since his father's death, whereas it appears by the decree, that by a former decree of the court the mense profits had been applied first to the payment of Eltonhead's debts, and afterwards been taken by the lady Waad; and the defendant was neither charged as heir or executor to his father, nor had any assets to answer the arrears.

It was ordered, that the defendant should be chargeable only with so much arrears as he had received out of the lands

DE TERMINO PASCHÆ.

Anno Regis 20 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

The MASTER OF THE ROLLS.

Pearson against Pulley. April 25.

The bill being to redeem a mortgage made in 1632, and it being insisted on by the defendant, that he came in as an assignee at the third hand, and so it would be hard to put him to an account now; the Lord Keeper said, that in regard there had been no stint put to the time a mortgage is to be redeemed, the defendant shall come to an account; but in regard he comes in at an old hand, shall not account but so far only as goes in discount of his money, but not for the surplusage. And he said he would have a rule to limit to what time a mortgage shall be redeemable, and conceived twenty years to be a fit time, in imitation of the statute of limitation of real actions; but gave no rule in that, but only he directed that when a bill came to redeem an old mortgage, the defendant should plead or demur to it, that so the judgment of the court might be had upon it.

Special directions touching old mortgages.

The LORD KEEPER.

The MASTER OF THE ROLLS.

[103]

David Jenkins, Esq. against Sir Charles Kemis, Baronet, and others. April 28.

Edward Kemis, Esq. deviseth the lands in question after other estates tail (which are all spent) to Sir Nicholas Kemis for life, remainder to his first son, and the heirs male of his body, with other remainders over; Sir Nicholas hath issue Charles, father of the defendant Charles. In 1637, the defendant's father married Blanch, the daughter of Mansel, with whom he had 2500*l.* which Sir Nicholas had, and thereupon Sir Nicholas, and Charles his son, levied a fine, and suffered a recovery, and five years after, viz. 1 April, 18 Car. I. by indenture tripartite, whereto Sir Nicholas and Charles his son are both parties named; and though Charles never sealed, yet he consented to the use thereof, reciting that Nicholas was tenant for life, the remainder to his son

Rep. Chanc.
Part 1, 376.

Charles Prout, and the marriage of Charles Prout, and that his wife's portion was 2500*l.* and that Sir Nicholas had it, and the fine and recovery had thereupon, and in consideration thereof, the uses of the fine and recovery are declared to be to Sir Nicholas for life, the remainder to his son Charles, and the heirs male of his body, begotten on the body of Blanch, the remainder to the heirs male of Sir Nicholas; the remainder to the heirs male of the body of Sir Charles the defendant's father, the remainder to the right heirs of Sir Nicholas, with a power to Sir Nicholas by deed or will to charge the land with 2000*l.* as he should think fit. After, in January, 18 Car. II. the Marquis of Worcester borrows of the plaintiff's father 2000*l.* which was applied to the king's service, and prevails with Sir Nicholas Kemis, and Charles his son, then both under his command, by lease and release to convey the premises to the plaintiff's father in fee, by way of mortgage, wherein they covenant to make farther assurance. The mortgagors continue possession, and die. The defendant is eldest son and heir of the said Charles Kemis by a second wife, Blanch being dead without issue, but claims the premises as issue in tail by the settlement as son and heir of his father. The mortgagee brought ejectment against the defendant, and thereupon a special verdict, *ut supra*, and upon argument ruled against the plaintiff; whereupon the plaintiff being as well executor as heir to his father, brings his bill in equity, suggesting the tripartite deed antedated, and however to be merely voluntary and fraudulent as to the defendant, he not being the issue of Blanch, and so not within the consideration of the tripartite deed and settlement, and the plaintiff being a purchaser, and the defendant's father or grandfather being taken by the plaintiff's father to be seized in fee when they made the mortgage. And it was farther insisted on by the bill, that Sir Nicholas having a power to charge the premises with the payment of 2000*l.* and the mortgage being for 2000*l.* though it were by way of conveyance of the lands, and not by a charge of the lands, and so according to strictness of law not good: yet in equity it ought to be taken as in execution of the power, and that nice legal defect ought therefore to be supplied in equity to the plaintiff, who is in under a purchaser.

For the plaintiff it was further insisted, that Sir Nicholas's power ought to be knit to his interest, and so come in supply of his interest to make the mortgage good. And if a person that hath power to charge lands for a sum of money, do for the like sum convey lands to another, and covenant to make farther assurance (as here,) equity will compel him to execute his power to the benefit of the person from whom he had received the money. And the defendant was heir to Sir

[104]

Whether a legal defect in execution of a power may be supplied in equity.

4 Leon. 8.
2. Vent. 350.
1 Levins. 238.
2 Chanc. Cases, 30.
Post. 241.

Whether if a man that hath power only to charge lands, farther assurance (as here,) equity will compel him to execute them for so much as he hath power

Nicholas and his father, and bound by their covenant to farther assurance.

Whereunto it was answered by the defendant's counsel, that the defendant does not claim as heir to his father or grandfather, but by the settlement; and that he was heir-male of the body of his father, and was within the consideration of the 2500*l.* portion which the grandfather had, and which belonged to the father; and however, if that settlement had not been made, the defendant was issue in tail by the settlement made by Edward Kemis's will. And it was farther insisted, that the settlement by which Sir Nicholas had power to charge the lands was discharged by the mortgage, he having conveyed all his interest out of him thereby, and that so he was disabled to execute his power after. And it was also insisted for the defendant, that equity in this case ought to follow the law, the defendant claiming by precedent title to the plaintiff in such manner, that there was no equity to bind it farther than by law it is bound; and in truth it did appear (howbeit it was not found in the special verdict) that Sir Nicholas did, after the mortgage to the plaintiff's father, in pursuance of his power, charge the premises with 2000*l.* debt which he owed, which debts the defendant's father paid accordingly.

to charge them, shall equity enforce him to execute his power to the same person?

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The Lord Keeper conceived the power was not destroyed by the mortgage, because it was by lease and release, and not by fine or feoffment. Yet both he and the Master of the Rolls were of opinion that the plaintiff could not be relieved in equity. Nevertheless, at the plaintiff's importunity, he directed a case to be made, and after Michaelmas Term, 1668, he dismissed the bill.

Where a power to charge lands shall be destroyed by the conveyance of him that hath the power, and where not.

The LORD KEEPER.

Justice TIRREL.

Justice RAINSFORD.

Haynes and others, Executors of Smithby, against Harrison and others, Farmers of the Customs. May 19.

On a Demurrer to a bill of review.

The bill was a bill of review to reverse a decree made by the Lord Chancellor *Hide*, for that by that decree all interest due on several securities by bond and judgments, and costs at law, suffered before the first bill in suing those securities, were taken away, upon a pretence that the money lent the defendants by the plaintiff's testator was paid by them to the king, in consideration of the farm of the customs, which they

Errors assigned.

[106]

Where interest is due on a bond, and the debtor pay any sum less than the interest, the payment is accounted interest only.

did not enjoy; whereas their testator was not concerned in the bargain; and if disposing money by the borrower, and any accident befalling it afterwards, should create an equity against the creditor, it would destroy all commerce. And by the course of the court, which is the law of the court, where interest is due on a bond, and the debtor pay any sum less than the interest, the payment is to be accounted interest only, yet the decree allows such payments (although they were much less than the interest then due) for principal. And the court hath also taken away the plaintiff's costs at law, though by the decree 800*l.* is still due to the plaintiffs on legal securities, and the proceedings and costs at law were before any considerable part of the principal, was paid, taking the interest for the principal, as the decree doth; so that the proceedings were legal, and without those the plaintiff's testator could not recover his debt, and so ought to be allowed those costs.

Interest upon a debt due by specialty, and costs at law, may upon circumstances be taken away in equity.

The defendants demurred, and insisted, that there is no error in the body of the decree, nor new matter to reverse it, and insist that this court ever hath a power upon circumstances to relieve against penalties, judgments and executions, and to abate and moderate, and sometimes discharge damages and costs; and it was insisted it had exercised such power in the Lord Keeper *Coventry's* time. And the court did declare this court had a power upon circumstances to abate and moderate costs and interest, and sometimes to discharge them; and they must take the decree as they found it, whereby it appears *Smithby's* debt was ill made up, and that the farmer became bound in consideration of the farm, which they did not enjoy, and costs are in the discretion of the court; and costs discharged there, because there was no oppression. And so the whole court declared they could not go out of the decree, and saw no cause to reverse it, and so dismissed the bill.

DE TERM. SANCT. TRIN

Anno Regis 20 Car. II

IN CANCELLARIA.

The LORD KEEPER.
Chief Baron HALE.

Cuthbert Morely, Esq. against Jerome and Henry Elways.
June 1.

The end of the plaintiff's suit is to have the redemption of a mortgage, made by the plaintiff and his father, James Morely, Esq. in December, 1641, to Jerome Elways, father of the defendants Jerome and Henry. Against the plaintiff's relief, the defendant set up a release made by the plaintiff in 1646, of all his equity of redemption, and a decree made by the Lord Chancellor *Hide* in this cause in 1663, which decree is penned as if made by consent. This decree being signed and enrolled, and the plaintiff not able to perform the same, could not have a bill of review; nor could he be relieved by such bill, if it had been brought, the release barring all his pretences, and that being upon a secret trust, he could not prove the trust positively, the witnesses being dead, and so he was not relievable neither in law nor equity. Whereupon the plaintiff and Baron *Greenvil*, Esq. petitioned the lords house the last sessions of parliament for relief against the said decree and release. The cause held many debates at the bar of the lords house before Christmas 1667, the great question being, Whether the release was made in trust, or *bona fide* for a valuable consideration? the proofs offered to evidence the trust were circumstantial and not direct positive proofs. One thing offered by the plaintiffs to evince the truth of their assertion to their lordships in affirming the same to be only a trust, was, that their lordships would please to consider what debts were due from the plaintiff or his father to the defendant when the release was made, and with that to take notice of the value of the estate released at the time of the making thereof. As to the reading the proofs to both these, the parliament being to adjourn in two days, and there not being time, their lordships adjourned the consideration of these two things, and reading the proofs to the value of the estate, desisted until their next meeting after Christmas.

Release of equity of redemption.

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The Lord keeper present thus far.

But the next meeting after Christmas, the Lord Keeper

being absent, the Lord Privy Seal sate on the wool pack, and the cause had two days hearing when all the plaintiffs and defendant's proofs were read to the values; and the house, after several days debate of the matter, being satisfied that by the proofs it clearly appeared that the value of the lands was much greater than to make a satisfaction for the debt for which it was released, did adjudge the said release to be a farther trust to pay 80*l.* per annum to the comptroller for life, and set aside the decree aforesaid, and referred the cause back to the court, to proceed as in the case of an equitable mortgage, which their lordships adjudged this to be.

Luna primo Jun. 1668. This cause was heard in court, when a decree was made for the defendants to come to an account, and the plaintiff to be admitted to the redemption of his estate. The ordering part is as followeth:

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First, that Jerome always come to an account for all the profits of the lands in question, which he or his father, or any other to his or their use, or by their direction or appointment, have, or might without their own wilful default have received. That sir William Glascock should take the account; but with this direction, that in case the lands mortgaged in fee were not a sufficient security for the money due to the defendant's father, and for which he now stands engaged for them, and the pre-engagement that was thereupon at the time of the defendant's father's taking the sequestration over, and besides the other lands mortgaged, in which at the time of the defendant's entry, and the release made, the plaintiff had only one estate for life, that then the defendant shall be charged in the account no more for the lands held for the plaintiff's life, than the master shall really judge them to be worth, without respect to the benefit that hath happened by the continuance of the plaintiff's life.

A mortgage for an estate for life on an old mortgage shall not account for more than the estate had been worth to be sold.

The plaintiff, grieved with this direction, procured a rehearing by the Lord Keeper, assisted with the Lord Chief Justice *Vaughan*, and Chief Baron *Hales*, and they confirmed this order, and that in respect of the contingency of the estate, and not for what was made, the mortgage being above twenty years old.

For the plaintiff it was insisted, that this was a new direction without a precedent; and that it was safer to judge what was, than what might have been; and that at this rate the western estates would not be mortgageable.

Yet upon appeal in parliament ordered otherwise.

The plaintiff by petition complained of this direction to the lords in parliament, and upon a solemn hearing at the bar of the house he was relieved, and the Lord Keeper ordered to direct the mortgagee to account for the whole profits of the estate for life, as in the case of other mortgagees.

Baron TURNER.

Delamere against Smith, the Executor of Smith.

The plaintiff having had great dealings with Smith, the testator, for malt and other things bought by the plaintiff, by that means he became indebted to the defendant's testator in several great sums, for which he gave him security by mortgage, bond or otherwise.

Afterwards the plaintiff became a great loser by the badness of the malt he bought of the defendant's testator, and other accidents, and thereupon Smith and he came to a new agreement, that in consideration of 80*l.* lately before paid, and of 70*l.* paid on the plaintiff's behalf by one Tubbing, the plaintiff's father-in-law, and of 40*l.* more promised by Tubbing at a short day, that if the 40*l.* were paid accordingly, that then if the plaintiff should pay Smith 800*l.* in four years by 200*l.* per annum, that the said Smith would deliver up the plaintiff all his securities, &c.

The money was all paid to Smith the testator but 104*l.* though not at a precise day: so to have those securities up upon paying what was unpaid upon the last agreement, with damages from the time it should have been paid, is the scope of the bill.

In this case it was insisted for the defendant, that where a greater sum is due by specialty, and a less agreed to be taken for it, to be paid in certain sums at certain days, if the agreement be not strictly pursued, and the moneys paid precisely at those days, but part of the money paid at other days, a court of equity ought not to oblige him that made that agreement (in favour of the person failing to perform it) to stand to it upon payment of so much as will make up the money paid since the last agreement, with damages for the same, from the respective times the same should have been paid by that agreement, to the times the same were paid, and damages for what remains unpaid, till the same be paid. But if the plaintiff would have any benefit by the agreement, he ought literally to have performed it, which was in his favour, and without any penalty; and therefore insisted that the plaintiff was not to have any benefit by that agreement.

The baron ordered this matter to be made into a case; but as yet nothing done therein. And it is to be observed in this case, that part of the consideration of the agreement was, that Tubbing (who was not obliged by any former security) had paid Smith 70*l.* and undertook to pay him 40*l.* more; so Smith bettered his security, &c.

Whether when a lesser sum is agreed to be accepted at precise days in lieu of a greater, if he that is to pay, fails in payment at those days, he shall not have any benefit by that agreement.

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Ant. 92. Post. 301.

2 Chanc. Case 1.

Degg against Osbaston.

Money paid in by the borrower to the scrivener, no good payment to conclude the lender.

The like case with that of Hen and Conisby, ant. f. 93. and upon solemn debate ruled as that was. And in both these cases the mortgagee was ordered to take his principal without his interest; and time was given for payment of the principal, (viz.) a year's time.

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DE TERM. SANCT. MICH.

Anno Regis 20 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

Sir Geoffrey Palmer, the King's Attorney-General, on the behalf of Jerome Smith, a lunatic,
against

Sir Robert Parkhurst and others. October 26.

The bill did suggest, that by inquisition taken before the mayor of London, by virtue of a writ to him directed, the said Jerome Smith was the 23d of June, 1664, found a lunatic, and had lucid intervals, and had not sufficient government of himself, his lands and goods; and that he was lunatic the last of June, 1647, and during his lunacy he had several sums of money due to him, which he had wasted, and alienated divers goods, but to whom the jurors were ignorant. And did charge, that one Archibald owed the lunatic during his lunacy 1300*l.* by good security; and that in 1656, the defendant caused the lunatic to assign Archibald's debt to him, and had received the same upon colour of a satisfaction given to the lunatic for the same, whereas that pretended satisfaction was not valuable, and was done in prejudice of the lunatic. And to have an account of the 1300*l.* and to be relieved was the scope of the bill.

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The defendant sets forth by answer, that he sold the said Jerome Smith in 1656, a manor, which he much desired to buy at 1200*l.*, it being the place of his birth; Jerome Smith assigned Archibald's debt for to satisfy himself the purchase money, and pay the overplus to Smith, which he did, and did convey the said manor to Smith, and insisted that Smith was not a lunatic at that time, but did usually buy and sell, &c.

This being the nature of the case, it came first to be heard before Justice Tirrel, who although it did appear that the defendant had conveyed the said manor to Smith for the said 1200*l.* and that Smith did at that time usually barter, and was not found a lunatic till eight years after, with a retrospect of seventeen years, did order the defendant to account for the 1300*l.* being Archibald's debt, and to satisfy the same with damages, without any provision for the defendants having the manor again, or account for the mesne profits. And though it was stood upon at the hearing, that in case of a lunatic (where the king hath no interest in his estate, but as *pater patriæ* commits him to another to manage it for him, the lunatic, in case he recover his senses and wits, shall have his estate again; and if not, it will go to his administrators) the lunatic himself (as in the case of an infant) ought to have been a party: yet that opinion was over-ruled by the judges, and by the Lord Keeper on a re-hearing. But the Lord Keeper did stay the passing the decree, and gave liberty to the defendant to traverse the inquisition.

A bargain by a lunatic eight years before the lunacy found, avoided by being found a lunatic, with a retrospect of seventeen years.

Yet the party admitted to traverse the inquisition. Note, that generally a lunatic ought to be made a party: but the reason why it was overruled here, was, that he might stultify himself.

The LORD KEEPER.

Carter and others, creditors of Church, against Church, alias Westin, and others. October 28.

Church deviseth some part of his lands and tenements to his executors to sell for payment of his debts, and the rest of his lands he devised to marry his daughter, in fee, being then a year old, and declares that his executors shall receive the profits of those lands until his daughter come to the age of one and twenty years, towards payment of his debts and legacies. The daughter died at five years old. The Lord Keeper was of opinion, that the charging the profits till the daughter attained one and twenty (though she died before) amounted to a term till she should have attained that age, if she had lived: and cited Boraston's case, 3 Co. and a case in Dyer, where lands were given to a mother for education and maintenance of the daughter till eighteen years old; the daughter died before eighteen, yet adjudged a good term to the mother till she should have attained eighteen had she lived. And he said that the principal case was a much stronger case.

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Devise of profits till a child come to 21 years, is a good devise of a term till the child would be 21, though he die before.

The LORD KEEPER.

Justice WINDHAM.

Jacob Ash against Gallen. November 18.

It was declared, that a use upon a use will not rise by bargain and sale. Dyer 155, and Chudley's case, Co. Rep.

But for the plaintiff it was insisted, that though a use could not rise as a use upon a use, yet as a trust it would in equity. And a case was ordered to be made, which was this: Isaac Ash with his own money bought lands of 100*l.* per annum, and took the conveyance by indenture in these words: grant, bargain, sell, alien, enfeoff, and confirm to Isaac Ash, his executors and assigns, to the use of Isaac for life; remainder as to one third to his wife for life; remainder to Jacob Ash and to his heirs, (whose heir the plaintiff is) with a letter of attorney to make livery. The deed is acknowledged, and duly enrolled in chancery. Two months after enrolment, livery is made, and endorsed on the deed. The plaintiff and defendant's wife were both grandchildren to Isaac Ash, who by lease and release did convey the lands in question, the one moiety to the plaintiff, and the other moiety to the defendants and their heirs; and the plaintiff did not except to this disposition in Isaac's life; which if he had, Isaac would (as was insisted for the defendants) have otherwise provided for them, he having given every grandchild to the value of 50*l.* per annum, but the defendants, to whom he gave nothing but the moiety of the premises.

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Whether a use upon a use in a deed enrolled be to be supported in equity as a trust.

For the plaintiff it was insisted, that Isaac intended to take the estate by feoffment, and that the enrolling of it first was only for safe custody of the deed; and that, however, the uses upon a use would not rise in law, yet in equity they were good by way of trust.

For the defendant it was argued thus upon private discourse of counsel, That Isaac having by the deed an election to take it either by feoffment (which if he did, it would not be in his power otherwise to dispose it) or by bargain and sale, whereby he might have power to dispose the estate as he pleased; and he having elected to take it by enrolment, and disposed the same by act executed in his life, it was apparent he intended to take it so as to dispose it, and therefore no reason in equity to make any other operation of this conveyance than the law made.

There was some diversity of opinion amongst counsel touching this case; but the parties agreed among themselves, and it was not argued at all.

The LORD KFEFER.
Justice TWISDEN.

Read against Read. November 25.

The lady Read, wife of Sir John Read, had by petition got a *ne exeat regnum* against her husband, upon suggestion that she having gotten a sentence for alimony against him in the Spiritual Court, he refused to obey it, and in avoidance of it threatened to go beyond sea.

The husband moved for a *supersedeas* of this writ, and whether it lies in this case? was the question.

For the husband it was said, that every man may travel where he will, unless he be prohibited by the King's writ. Dyer 296. This writ is a prerogative writ, which the king may use as he hath the care of his people. 2 Inst. 54. A writ *de securitate invendienda*, not to go beyond the seas, lies not against a layman, but a clergyman only, *qui habet curam animarum*, and they are to maintain the laws of the church, which if they went beyond the seas, they might adhere to the pope, and they have no temporal estate to oblige them to stay here; and this writ ought to be endorsed *patronis sequitur hoc breve*; but in this case no patron, no clergyman. 19 Jac. In the case of Welby and Stevens, at the suit of his creditors, which were many, there this writ was granted; but a bill was filed, and none here. Crisp against Bishop, 15 Car. II. The writ granted upon suggestion he was indebted; but on putting in security, it was superseded.

On the other side, for maintaining of the writ, and on the behalf of the lady, it was said, the king may restrain a subject from going out of the realm. Knowls against Luce, Moor 109. Selden's Janus Angliæ 92, saith, it extends *tam laicis quam clericis*. There is no other writ but this; and if this go not to a layman, then there is no writ to a layman. It is true, all writs in the register are clericis; but that's but an addition. The ground of the writ is, that a person is going beyond sea to the prejudice of the king; and the writ is to give security not to go till the king license him. Leigh against Bever, 9 Jac. A precedent, 9 Car. I. Mead's case, a *ne exeat regnum* awarded for a private matter. Hill, 52. Boyl against Slugborough, it was a question, whether this writ was grantable at the suit of a private person?

But the court resolved this writ well lies in the principal case, and will not supersede it.

The nature of
a writ of *ne
exeat regnum*.

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A *ne exeat
regnum* lies
for a private
matter with-
out a bill.

The LORD KEEPER.
Chief Baron HALES.
Justice ARCHER.

*Dame Margaret Pridgeon, Relict of Sir Francis Pridgeon,
against the Executors of Sir Francis Pridgeon in trust for
Robert Pridgeon, &c.*

After several debates on both sides before the Lord Keeper, this cause came to be further heard by him in November, 1668, assisted with the Lord Chief Baron *Hales* and Judge *Archer*. And the case was thus :

Ant. 21.
2 Vent. 343.

The plaintiff being a widow, at her marriage with Sir Francis Pridgeon, suggests an agreement precedent to the marriage, between him and her, and others on her behalf, that notwithstanding her marriage, the rents and profits of all her own estate, and what personal estate and goods she had, should be at her own disposal ; and that she was possessed of certain goods, &c. before her marriage with him, which the defendants, the executor of Sir Francis, claimed, as being his executors in trust for the said defendant Robert, his nephew and heir, which by the said agreement she claimed.

Agreement
between hus-
band and wife
before marri-
age extin-
guished by
marriage.

This case of
the B. of Suf-
folk was in the
commission-
er's time.

See against
Brograve a-
bout 1639.

The wife may
not be suffer-
ed, though to
good uses, to
dispose of any

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money she
hath raised
out of her
husband's es-
tate by fru-
gality.

Gorges a-
gainst Chancy
1639.

A disposition
by feme co-
vert of moneys
raised out of
separate
maintenance
good again at
the husband.

For the defendants it was insisted, that if any such agree- ment were with Sir Francis before the marriage, it was ex- tinguished by the marriage ; and so cited Smith and Staf- ford's case, Hob. 216, and the earl of Suffolk and Greenvil's case ; and insisted, such-like agreement ought not to be countenanced in equity, being derogatory to the rights and privileges of marriage. And on the debating the matter of this cause, a case between Scot and Brograve, about 1639, in this court, was cited, which was thus :

The wife of an unprovident husband had, unknown to him, by her frugality raised some moneys for the good of their children, which she had disposed for that purpose, being otherwise unprovided for ; and this disposition of the wife the Lord *Coventry* had established by a decree. But afterwards, upon a review, and assistance of the judges, this decree was reversed, as being dangerous to give a feme power to dispose of her husband's estate. And another case between *Gorges* and *Chancy*, which was about Michaelmas term 1639, was cited, which was to this effect :

Baron and feme by agreement separated and lived apart, and agreed that the wife should have 150*l.* per annum se- parate maintenance, out of which she had saved some money, and put it out to interest, and took bonds in a friend's name, and disposed the money by will ; and this upon debate was established a good disposition ; and this was now declared to be a just order.

But note, that in this case it was an agreement after marriage with friends in the behalf of the wife for a separate maintenance: But in the principal case the Chief Baron declared, that though where an agreement is between baron and feme before marriage, that the wife may by will dispose of part of her estate, or for a thing which is future to the marriage, such an agreement is not dissolved by the marriage; yet where an agreement is to have execution during the coverture, as in the principal case, there the marriage extinguisheth such an agreement. And the whole court concluded the plaintiff had no ground for relief; and declared she had no cause of suit but by way of anticipation; for the executors did not claim the goods, but she feared the other defendant, the infant, for whom they were executors in trust, would claim the goods, &c. Yet the court declared, that they would further consider of the matter, and the cause hath not yet received any further hearing.

DE TERM. SANCT. HILL.

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Anno Regis 20 & 21 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

Goddard against Complin. January 27.

Tenant in tail demiseth his lands for ninety nine years by way of mortgage, and after marries; and in consideration thereof, and of 500*l.* portion, suffers a recovery, to enable him to settle a jointure, and afterwards takes up more money of the mortgage upon the former security. The jointress was plaintiff, and the question was, whether the defendant should be allowed money lent after the recovery and marriage?

Where a mortgagee lent new money on his old security without notice of an intervening settlement, shall be allowed it.
Hard. 318.

And the court declared, that if the defendant had no notice of the jointure when he lent the new money, he must be allowed it.

Another question was, whether the defendant had proved payment of the money supposed to be lent? and as to that, there was the receipt in the deed of the mortgage, the condition of the redemption on repayment of the money, and

What is good proof of payment of money against a purchaser?

the defendant's oath that he had paid it, which was insisted on, was evidence enough of payment after ten years against any person, and so the court inclined.

But the plaintiff standing upon it, that it was not sufficient evidence as against the plaintiff, who claimed as a jointress, there was farther evidence.

A recovery subsequent to a collateral purpose, shall enure to make good precedent estates.

There was also this question put : tenant in tail mortgageth for years, and afterwards upon marriage in consideration thereof suffers a recovery to settle a jointure, &c. Whether this recovery should enure to make good the mortgage, it being designed for the marriage settlement only ? which was answered : If no recovery had been, there could have been no jointure ; and the jointress could not have avoided the mortgage ; and she is in by the act of her husband, and no subsequent act of the husband could avoid his own act precedent. And it was also declared, that if tenant in tail confess a judgment, &c. and suffer a recovery to any collateral purpose, that recovery shall enure to make good all his precedent acts and incumbrances.

The MASTER OF THE ROLLS.

Collet, against Jaques. February 8.

Rent and arrears of it decreed (the deed being lost) because it did not appear what kind of rent it was.
Larch 24. 146.
Ant. 78.

The bill was for 3*l.* for a rent of 5*s.* per annum, arrear for twelve years. The plaintiff suggested, that the deeds by which the rent was created were lost, and also the rent for the future ; and there was proof of a constant payment of it till the last twelve years. And the Master of the Rolls decreed the defendant to pay the arrears and growing rent, because he said it was uncertain what kind of rent it was, and so no remedy at law ; and here the person is made liable for the rent, which for ought appeared he was not at law.

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The MASTER OF THE ROLLS.

*Duncumban, an Infant, against Stint, Executor of Stint.
February 1.*

An executor decreed to give security for a legacy.

The defendant's testator gave the plaintiff 1000*l.* to be paid at the age of twenty one years.

The bill suggested the defendant wasted the estate, and prayed he might give security to pay this legacy when due ;

and the Master of the Rolls did accordingly decree the defendant to give security.

THE MASTER OF THE ROLLS.

Eaton College against Beauchamp and Riggs. February 5.

There was a rent or pension of 1*l.* 14*s.* per annum, granted by K. H. 6. to that college, issuing out of lands. Riggs was executor of the ter-tenant, and to be relieved for the arrears of rent incurred in his testatrix life-time was this bill brought, which did suggest, that the college did not know the lands out of which the rent went, and so would not distrain. Beauchamp was the present ter-tenant; and though the person of the ter-tenant was not chargeable with the rent at law, but only the land by way of distress; yet, forasmuch as the testatrix held the land, and did not pay the rent, it was said, that thereby the personal estate of the testatrix was augmented. And so the Master of the Rolls decreed the executor to pay the arrears as far as he had assets of the testator's estate.

An executor decreed to pay arrears of rent which the testator's person was not liable to.

THE LORD KEEPER.
Justice TIRREL.
Justice MORETON.

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Slingsby against Hale. February 14.

On a Demurrer.

The bill was, a bill of review to reverse a decree made about twenty years since, wherein the mortgagor being plaintiff against the mortgagee to have a redemption, it was decreed accordingly, paying the money to be found due on account; and for that purpose referred to a Master to take the account. And it was also decreed, that if the plaintiff failed to pay the money at a day to be set by the Master, the defendant should hold discharged of all equity of redemption.

Pending the reference the suit abated by the death of one of the parties defendant: yet the account went on, without any notice taken to the court of the abatement; that the executor being a defendant to the original bill, the Master was attended on the behalf of both sides, and made up his report, and that confirmed and decreed, and that decree enrolled near twenty years since. And now the plaintiff being devisee of

the mortgagor, by bill of review assigns these errors, and now excepts against the decree.

First, for that in respect of the abatement, there was no cause in the court when the account was stated, and the decree drawn up and enrolled.

Secondly, that it was error for the court to make a decree for the defendant to hold free of equity of redemption on the plaintiff's bill.

Proceedings
after an abatement
decree and en-
rolled, no er-
ror or cause of
reversal.

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The demurrer was, in *nullo erratum*, and the plaintiff not entitled to a bill of review.

To the first it was answered, It was only an exception in point of form, and not in point of right; and that the account being stated and settled, ought not after such length of time to be let loose or unravelled into; and as to this point cited the case of the lady Cranbourn and Mr. Dalmahoy.

And as to the second, it was said, that circuity of action is to be avoided, and that there were many precedents of decrees in this manner for the defendant; and that what was decreed for the defendant was most just, and could not be denied upon the account of justice.

And the court declared they saw no cause to alter the decree; and so allowed the demurrer, and dismissed the bill.

After a complaint of this in the Lords house, the matter of the demurrer was re-heard March 9, 1670, by the Lord Keeper, Chief Justice *Hale* and *Vaughan*; and on long debate they seemed to incline against the plaintiff, but took time to consider. And after, 21 July, 1671, they all three delivered one uniform opinion clearly, that the plaintiff being devisee, is not entitled to a bill of review, being not in privity to the testator, against whom the decree was: as, if a judgment be against land, and the owner aliens the land, the alienee cannot bring a writ of error, nor the vendor. And so dismissed the bill for this reason principally. Yet the Keeper and Chief Justice *Hale* were of opinion that the error assigned was not sufficient error to avoid the former decree, but notwithstanding the abatement the account ought to conclude, and stand as an account stated.

A devisee can-
not maintain
a bill of re-
view, because
he is not in
privity.

Justice WYLD.

Weymberg against Tough. February 24.

On a Demurrer.

The bill was, to be relieved against an action of debt for money due to the defendant as a merchant from the plaintiff, for wares sold in Denmark. The equity was, that in the time of hostility between that crown and this, the defendant being a subject to this crown, the plaintiff was forced to pay the money he owed the defendant to commissioners authorized in that behalf to the king of Denmark; and that by the articles of peace between the two crowns it was agreed, that all moneys so exacted from each others subjects should be compensated by setting one against the other; and that the parties that paid the money to either of the kings' orders, should be discharged against the creditor.

Where articles of peace between two crowns can discharge a subject's debt.

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To this bill the defendant demurred, and insisted there was no equity; and that if the articles did bind private persons, they were as good at law as here; but at law they did not bind, for the defendant had a verdict.

For the plaintiff it was insisted, that the chancery was a court of state; and that the articles of peace were enrolled there; and that the bill was, to have witnesses examined beyond sea. The judge ordered the defendant to answer.

Chancery a court of state.

The LORD KEEPER.

Marah More against Nicholas Grice and others.

The plaintiff Marah's mother was sister of the defendant Grice; and by articles of agreement made between Thomas More the plaintiff's father, and Nicholas Grice the defendant (in behalf of his sister the plaintiff's mother) it was agreed, that in consideration of 800*l.* agreed to be given with the plaintiff's mother in portion to the plaintiff's father (whereof 600*l.* was Nicholas's own free gift) that the said Nicholas should stand seized in trust of the lands in question, as a jointure for the proper use of the plaintiff's mother for and during her natural life, the remainder to the issue of her body (which the plaintiff only is) the remainder to the right heirs of Thomas More. These lands were in truth mortgaged by More before, and the defendant did pay him 500*l.* of the portion, and was wrought upon by him to deliver up the articles, and for 5*l.* to release to More the lands; and More and his wife had by deed and fine sold the lands away; and

so to be relieved against the breach of trust was the intent of the bill.

And for the plaintiff it was insisted, that the defendant ought to make good to the plaintiff the value of the lands ever since her mother's death, who died about twenty years since, and the full value of the lands, if to be sold (by the agreement the lands being to come to her immediately after her mother's death.)

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But for the defendant it was insisted, that if there were a breach of trust, it was no ill intent in him, nor any thing to his benefit, but to comply with the necessity of the plaintiff's father, (who is still living;) and if a settlement had been made according to the articles, it might have been so awarded, that he and his wife might have prevented the estate from coming to the plaintiff. And they did after sell the lands by a fine; and however, the plaintiff's father, according to the true meaning of the articles, was to have had at least an estate for life in the lands: for it was absurd to think that the husband in marriage should settle his lands on his wife and her issue, and exclude himself for life; and being mentioned in the articles, that the wife should have them for a jointure, and after to her issue, the very word jointure did imply that the husband should have an estate for his life as well as the wife, and that was the usual way of settling jointures for life on the husband, and then in remainder to the wife for life. And it was said, that if a bill had been brought against More to compel him to make a settlement according to the articles, the court would never have excluded him of an estate for his own life. And of this opinion the Lord Keeper declared he was as to the husband's estate for life, and that he ought to have the premises by intention of agreement for life. And therefore, and inasmuch as 600*l.* of this portion was agreed to be given by the defendant as a free gift of his own, and it was uncertain what the value of the lands might be after the plaintiff's father's death, and there was 300*l.* of the 800*l.* unpaid, the Lord Keeper proposed, that the plaintiff should have the said 300*l.* with damages, and the defendant to pay it her accordingly. And so it was decreed.

The word jointure in an agreement implies that the husband shall have an estate for life as well as the wife.

DE TERMINO PASCÆ.

Anno Regis 21 Car. II.

IN CANCELLARIA.

Hele against Stouel. May 8.

The husband devised his lands to his wife during the minority of his son, and dies, and hath only a posthumous son, and by his will gives his wife power to make leases to raise money to pay debts, &c.; the wife enters, and takes the profits, and then marries a second husband, and he lives some years, and takes the profits, and dies, and the wife continues to take the profits of such part of the land as she had not let, for she did let some part according to the will. This son attains his age, and proves a revocation of the will, and prays his mother may account.

Where rents taken by colour of a title that's avoided, the receiver shall be accountable as a bailiff.

Ordered, that he shall account for all the profits that herself or her husband took; and the reason was, that she should be said to take them till the infant was fourteen years of age as guardian, and after as bailiff; and she was to answer as to what her husband took, as in a *devastavit*; the wife having no notice of the revocation, had paid legacies charged on the lands by will.

Ordered, that she be allowed those. But as for the leases she had made, though they were for fines and full rents, though she offered to account for the fines and rents, the court would not make them good, because the mother could not set or let lands.

Legacies paid by colour of a will which is after found to be revoked, allowed.

The LORD KEEPER.
Justice RAINSFORD.
Justice WYLD.

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Holstcomb against Rivers. May 10.

The defendant and one Collins were factors for the plaintiff in Spain before 1654. In that year they sent him to London on account, and charged themselves with divers goods of the plaintiff in specie. In 1656, there happened an embargo on English ships and goods in Spain, and a seizure of all the goods in the defendant's and Collin's hands, and on their books, and the defendant was cast in prison on that account,

and the bill was now to call the defendant to an account (Collins being dead) without making his executrix a party.

For the defendant it was insisted, that by reason of the seizure and imprisonment he could not account, having lost his books, and never seen them since; and that the plaintiff had been twice over with Collin's executrix, and she was no party; and that after this length of time, it would be hard to draw the defendant to an original account.

The surviving factor is answerable for himself and co-factor.

The executor of the co-factor first dying is accountable.

An account rested upon 14 years is conclusive.

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Where an accountant having lost his papers by on fault of his own, shall not be charged beyond his own oath.

Court. It was resolved for law, that (though *inter mercatores jus accrescendi* hath no place) yet the surviving factor was to account for what was made by himself or co-factor; and yet it was agreed that in this case an account lies against the executrix of the dead factor. And so it was ordered, that, in respect of the length of time since the account was sent, and no clear proof of any exception to it till after the seizure; and that when the account was sent over, the plaintiff was writ to, to send his exceptions speedily, if any be had, that the account should not be ravelled into, but ordered the defendant to account for, and satisfy what had been made by sale of the goods remaining in specie in the former account before the seizure. But in regard of the length of time, and the loss of the books, (which the defendant had sworn by his answer) it was ordered, that the defendant should not be charged in this account for more than according to his own oath what was made, or he did remember or believe was made by the sale of those goods. And with these directions, it was referred to merchants to take the account, who made a direction tending to draw a harder direction from the court upon the defendant in the way of his accounting. Whereupon his lordship appointed to re-hear the cause, and the same was accordingly re-heard by him, assisted by Mr. Justice *Rainsford*, and Mr. Justice *Wild*; and upon long debate, the former order was confirmed.

Prat against *Colt*. May 11.

On a Demurrer.

A trust of lands no assets.

The plaintiff had a judgment against George Holt, and brought his bill against his heir, to subject certain lands which he had a decree of this court for, upon a trust for his father and his heirs to satisfy his debts; and the defendant demurred, and this demurrer allowed: and the Lord Keeper conceived it all one with Bennet and Box's case But *quærc*, since the statute of frauds and perjuries.

DE TERM. SANCT. TRIN.

Anno Regis 21 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

Justice { TWISDEN.
 { WYLD.
 { RAINSFORD.

Vachel against Vachel and Lemmon. July 1.

Tanfield Vachel, by his last will in writing, deviseth to the effect following, (viz.) I give the use of all my several paintings, and books of print, my coloured collection of medals in gold, silver, and brass; all my rare turnings of ivory and guaiacum, with my press of books, and chest of drawers with the perspective in it, to my dearly beloved wife (the defendant, Rebecca Vachel) during the term of her natural life. And my will is, that if she be with child of a son, that then after her decease the same paintings, books of print, &c. shall be left, remain, and come to the same son. But if my wife be not with child of a son, or if the same son shall die without issue male of his body, then my will is, that all the said paintings, books of print, &c. after the decease of my said wife, and the death of such son as my wife is now with child of, shall come and remain to the use of Thomas Vachel (the father of the plaintiff) of which my will is that the said Thomas Vachel shall have the use only during his life, and that he leave them to my kinsman Thomas Vachel, his son, (the plaintiff) and that he shall, as far as in him lies, so dispose thereof to him that shall by God's blessing next succeed himself in my manors and lands in the county of Berks, that they remain as an heir-loom, and go and remain to such person and persons as shall inherit my said manors and lands, who I desire may prove lovers of learning, ingenuity, and arts. Which clause the defendants insisted to be revoked by a codicil, and the matter as to that point having been fully heard, and his lordship having had the opinion of civilians therein, did on the first of May last declare his judgment to be, that the use of the aforesaid rarities was well settled by the will of the said testator upon the plaintiff Thomas Vachel after the death of the said defendant Rebecca Vachel, and not revoked. But the defendant's counsel then insisting, that though they were admitted to be agreeable to the civil law,

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A limitation on
personal chat-
tels to one
during life, re-
mainder to an-
other good.

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yet the very limitation in the clause of the will of the rarities to the plaintiff was void by the common law. His lordship for the defendant's farther satisfaction, declared he would have the opinion of the lords the judges therein, upon that single point of the limitation of the rarities, whether the same were a good or void limitation. And the cause now standing in the paper for a determination in that point, his lordship declared he had advised with the Lords the Judges, and now assisted with Mr. Justice *Rainsford* and Mr. Justice *Wyld*, upon deliberate consideration had of the clause aforesaid, in the will, whereby the use of the rarities are devised to the plaintiff after the death of the said *Rebeccah Vachel*; and forasmuch as the said *Thomas Vachel* the plaintiff's father died in the life-time of the said *Tanfield*, and the defendant *Rebeccah* being not with child of a son, so as the contingencies upon which the limitation was made never happening, his lordship with the Lords the Judges were all clear of opinion, that the devise to the said *Thomas Vachel* the son, was an absolute devise, and good in law, and that the defendant *Rebeccah Vachel* ought only to have the use of the said rarities during her life only, and the plaintiff is to have the same after her death, according to the said will; and both order and decree the same accordingly, and that the defendant be examined upon interrogatories for the discovery of the particulars of the rarities and matters so devised, and that an inventory of the said rarities be made according to the said order of the first of May. And as touching security now prayed by the plaintiff's counsel, and other matters for final completing this decree, the court declared, that the same was not the proper business of this day, and they would not now determine the matter, but leave the plaintiff to move this court therein, and then such farther order shall be made as shall be just.

The LORD KEEPER.

Justice { *TWISDEN.*
 { *RAINSFORD.*
 { *WYLD.*

Wood against Sanders, or Sanders against Wood. July 1.

A long term of years was assigned upon a trust to permit the father to receive the profits for sixty years, if he live so long; and after his death to permit the mother, his wife, to receive the profits for sixty years, if she so long live; and after the death of the father and mother, to permit John the son

his executor, &c. in case he survive his father and mother, to receive the rents, &c. And that the trustees, at the request of John, after the death of his father and mother, should assign to him, his executors, &c. But if John die in the life time of his father and mother, and leave issue, which shall be living at the death of his father and mother, then the trustees to assign the premises to such son of John which shall be his eldest son at that time, &c. But if John die without issue before any such assignment, that then the trustees shall permit Edward, another son of the said father and mother, and the heirs of his body; and in default of such issue, Nicholas, a third son of the same father and mother, and the heirs of his body; and for default of such issue, the executors, &c. of Nicholas to receive the profits of the premises during the term, to their own uses. John dies intestate in the life of his father and mother, and without issue, and before any assignment the father and mother die; Edward the son enters and receives the profits, and dies intestate without issue; Elizabeth his wife takes administration, enters and receives the profits; Nicholas the third son, takes administration to John his brother, and procures the trustees to assign to him. [132]

The question was, who hath the right to this lease? whether Nicholas the administrator of John (who died in his father's life) or the administrator of Edward, who enjoyed during life, or Nicholas the third son in his own right?

It was unanimously resolved, that where the trust of a term is to one for life, the remainder for life, the remainder to a third person for the whole term (if he outlive the tenants for life) the remainder to another as heir to Edward the son, and the heirs of his body, and the remainder to the third person, viz. John, being merely contingent, was not so vested in him, as that his executors could have it, he dying before his father and mother; and that the contingency not happening, he dying in the life time of tenant for life, the remainder over to Edward was well limited after such a contingent remainder. Vide as to this point the case of the duke of Norfolk.

Where the trust of a term is to one for life, the remainder for life, the remainder to a third person (if he outlive the tenant for life) the remainder to another and his heirs, that the remainder to the third person (he dying before tenant for life) does not vest in his executors.

DE TERM. SANCT. MICH.

Anno Regis 20 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

Smith against Palmer. October 25.

Upon a difference between the plaintiff and one John Browning, an award was made that Browning should pay the plaintiff 5*l.* in hand, and 23*l.* at several days, and for that purpose Browning to enter into a bond of 50*l.* penalty. This bond was taken in the name of Brown. Browning exhibits his bill against Smith and Brown, suggesting a fraud in obtaining the said bond, and that the same was in trust for Smith. Smith and Brown join in the answer to that bill, and there Smith swears, that he was indebted to Brown more than 23*l.* and that Browning being awarded to pay him that 23*l.* Brown did accept of that bond for so much of what Smith owed Brown; and so said it was not upon any trust for Smith, but taken to Brown's own use, Brown being dead, and the defendant his executor. The plaintiff Smith by his now bill seeks to have the bond out of Brown's executor's hands, and chargeth his name to have been used in trust for the plaintiff.

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The defendant pleads the former answer in the other cause, and that thereby the now plaintiff had denied any trusts in Brown for him, and swore the bond was taken in Brown's name for his own use, *prout*.

A trust decreed for a person who in his answer on oath in another cause had denied the trust, because drawn in to answer so by fraud.

The plaintiff replied, that Brown was his solicitor in the other cause, and that he answered by his advice, and that he advised it was fit to answer to them, and for that purpose advised the now plaintiff, before he put in that answer, to enter into a bond to Brown for more money, that so he might swear as he did in that answer; which bond he promised Smith to deliver back when he had put in his answer; and did so, and averred he was at the whole charge in defending the suit, and that Brown after that answer owned the trust in that bond of 23*l.* for the plaintiff; and there was proof of that.

And upon the hearing of this cause, it was taken to be a fraud in Brown to draw the plaintiff in to put in such an answer upon oath in the other cause, that the bond was in trust for him: and the defendant was decreed to deliver up the bond to the plaintiff, with a letter of attorney to put it in suit.

At the Rolls. The MASTER OF THE ROLLS.

Richard West, Clerk, and divers others the Churchwardens and Overseers of the Poor of Great Creaton, against Knight and his Wife, Executrix of John Palmer. Oct. 27.

John Palmer had by will given 50*l.* to the parish of Great Creaton, where he was born, (without saying to what use.) The minister, churchwardens and overseers for the poor exhibited this bill for the 50*l.* suggesting, that he intended it for the benefit of the poor.

The defendant, the executrix, confessed the devise, and offered, if she were bound to pay it, to assign some security for money owing to the testator to satisfy it.

10 May, 1669, this cause was first heard by the Master of the Rolls. And it being then insisted by the defendant's counsel, that the devise was void, and that the parish being no corporation, could not sue for it by original bill; and that it was a void devise, for that there was no use limited touching 50*l.* whether it were for the poor, or for repair of the church, or highways, &c. And it was stood upon, that if the plaintiffs had any ground of relief, it must be by commission of charitable uses, and not by bill. The Master of the Rolls ordered precedents to be produced before he would deliver his opinion.

And now at this day, upon farther hearing the cause, a decree of this court, 30 June, 1657, was produced, St. John's College against Plat, where upon the advice of four judges it was resolved, that upon an original bill the chancery might relieve within the statute of charitable uses. And therefore, inasmuch as the 50*l.* was the personal legacy, and no devise of lands, decreed, that the 50*l.* be paid as far as the defendants have assets of their testator, and directed it to an account to see what assets, and the master to whom it was referred to see the money disposed for the benefit of the poor of the parish.

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Relief given by bill on the statute of charitable uses.

Money given to a parish generally without saying to what use, decreed to the poor of the parish.

The LORD KEEPER.
Justice WINDHAM.
Baron TURNER.

Nelthrop and Margaret his wife, against Hill, Biscoe, and Anne his wife. October 6.

This cause was heard first before the Lord Keeper. The case. The plaintiff Margaret and the defendant Anne were the two daughters of Smith, who having made his will eigh-

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teen years since ; and Hill, executor and curator of the children (both then in infancy) by his will gave several legacies, and then gave the residue of his personal estate to be equally divided between his two daughters, Anne and Margaret ; and if both die before marriage or full age, then he deviseth it over to another. Biscoe marrieth Anne the eldest sister, and then one moiety of the estate, which was good, and in the hands of the executor, is paid to Biscoe and his wife, and Biscoe settles a jointure for this on his wife, and gives the executor a discharge.

Afterwards the executor puts out the other moiety (Margaret being still in minority) on security, and part of it is lost. Then Margaret marries Nelthrop, and they bring this bill against the executor and Biscoe and his wife to have a contribution towards the loss borne by them, and to have Biscoe refund.

Upon the first hearing it was so decreed, unless Biscoe showed precedents to the contrary.

Now upon farther hearing this day, (viz. 10 Jan. 1669,) before the Lord Keeper, Mr. Jus. *Wild* and Mr. Baron *Turner*, it was for Biscoe insisted, that by the marriage of Anne, her moiety became due, and the devise over is defeated : so that if Biscoe and his wife had brought their bill for it, the executor could not have denied payment of it, and so Biscoe hath done no default, who hath not his money till due, and he is not concerned to look any farther ; and in lieu of the portion a jointure is made, and a release for the legacy is given ; and probably, if the executor would not have paid, Anne might have lost her preferment, and the executor was by the will the curator of the children. And it was said, that by Anne's marriage first, she became first entitled. And it was insisted, that where legacies are payable at several times, and the legacy that is first due is paid when due, and there is money in the executor's hands to pay the other legacies, that if a loss fall on that afterwards, there is equity in that case to put the first paid legatee to refund.

For the plaintiff it was insisted, that there was in this case no time limited for payment of either ; and that by the marriage of Anne, the devise over being defeated, both became due and payable, the devise being indefinite, without any express time of payment ; and the plaintiff Margaret's infancy ought not to turn to her prejudice ; and that it was the testator's intention that they should have it equally, one as much as the other. And if Biscoe had sued, the executor might have required security to refund.

Where a legatee shall refund for want of assets.

And it was said and admitted by the court, that if executors pay out the assets in legacies, and afterwards debts appear, and they be forced to pay them, of which they had no notice

before the legacies paid, that the executors by a bill here might force the legatees to refund.

But as to that it was answered, that case was not like to this; for there was not enough to pay all when the legacies were paid, but here was enough when the legacies were paid to pay all, and the loss since.

And for the plaintiff it was farther insisted, that a division could not be made without the plaintiff Margaret called to it; and the case of Grove and Banson insisted on, where Banson had a conveyance and statute for his wife's legacy, and yet put to refund.

But as to that case it was answered, there was not any payment, but a security, and by that he would have had a redemption; so this payment was not paid, but executory. And the plaintiff cited the case of *Picks and Vincner* upon Sir Henry Martin's certificate, which was 29 Oct. 1639, and was in substance thus: that an executor may not pay one, if he hath not enough to pay all; and an executor is not bound to pay a legacy without security to refund if there be want of assets to pay either debts or legacies. Which was not, as is said, to this purpose, there being at the time when this legacy was paid, enough to pay all.

Picks against Vincner, 29 Oct. 1639.

Executor not bound to pay a legacy without security to refund.

Ordered the cause be set down to be re-heard originally, as well against the executor, as the legatee Biscoe and his wife.

Quære, if there be not a difference between debts and legacies thus: debts may appear to the executors, but legacies appear in the will? and *quære*, if therefore executors be not bound more strictly to take security against legacies that do appear, than debts that do not?

The MASTER OF THE ROLLS. *First Hearing.*

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Charles Fry, Gent. and the Lady Anne his wife, and Mountjoy Fry, an infant, by their Guardian, against George Porter, an infant, by George Porter his Uncle and Guardian. Oct. 13.

Mountjoy earl of Newport had two daughters, Isabella, a Vent. 842. who by his consent married Nicholas earl of Banbury, (whose daughter the plaintiff the lady Anne is) and Anne, who without her father's consent married Thomas Porter, Esq. by whom she had George the defendant the infant.

The earl of Newport being seized of Newport-house in fee, by his will in writing deviseth in these words:

Item. I give and bequeath unto the lady Anne countess of Newport, my dear wife, all that my house called Newport-house, and all other my tenements in the county of Middlesex, for her life; and from and after the death of my said wife, I do give my said house, and all other my tenements in Middlesex, unto my grandchild the lady Anne Knowls, the daughter of Nicholas earl of Banbury by the lady Isabella, my late daughter, and the heirs of her body to be begotten. Provided always, and upon condition, that my said grandchild the lady Anne Knowls do marry with the consent of my said wife, and of Charles earl of Warwick, and of Edward earl of Manchester, or the major part of them. And in case the lady Ann Knowls do and shall marry without the consent of my said wife, or the major part of my trustees aforesaid, or shall happen to depart this life without any issue of her body, then I will and bequeath all my said premises unto my Grandchild George Porter, son of my deceased daughter the lady Anne, late wife of Thomas Porter, Esq. and to his heirs for ever.

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The plaintiff Fry, after the death of the Lord Newport, stole away the plaintiff, the lady Anne, in the night from Newport-house, (where she lived with her grandmother) over the garden wall; and so soon as she was missed by her grandmother, and she was informed of this fact, she sent to the Earls of Warwick and Manchester, to inform them of it, who both protested against the marriage as unfitting for the young lady, who was at that time about fourteen years of age, and declared their utter dislike of it. Afterwards these two earls being examined for the plaintiffs as witnesses in the cause, say, that they do assent to the marriage; and that they do not know but that if their consents had been asked for before the marriage, such reason might have been given as they might have consented to it. And they and other witnesses speak as to the Earl of Newport's intent, and frequent declarations, that the plaintiff, the lady Anne, should have Newport-house, which the plaintiff's counsel would lay weight upon to interpret the meaning of the will to be in *terrorem* only, and not to defeat the devise to the lady Anne.

The bill was to be relieved against the condition and the breach of it.

And for the plaintiffs on the first hearing, which was before the Master of the Rolls only (in the Lord Keeper's absence) it was insisted on by Serjeant *Fountain*, that there were three things in equity, upon which the plaintiff ought to be relieved against this penalty.

1st. That there was no other reason for this condition and penalty, but to prevent the lady's marriage without consent, and therefore it was to be expounded *in terrorem* only.

2d. That this young lady was but fourteen years old, and knew nothing before her marriage of the condition.

3d. As she was in her infancy, and knew nothing before her marriage of the condition, so soon after as she did know it, she did go to the two earls (her grandmother being dead) and they did approve of the marriage.

For the defendant it was insisted, that the infancy or want of notice to her of the condition, was of no weight, for that there was not by the will any provision made, or any directions given to give her notice, but as she takes by the will as a purchaser, so she must take it subject to such condition as the will hath subjected it to, and is to take notice at her peril; and an infant may break a condition; and this act of hers in marrying was but what the earl had reason to expect she would do before she came to the age of one and twenty years, it not being usual for ladies of her quality to stay till one and twenty before they marry. And as to the pretence that this condition was *in terrorem*, it was said, that it was a limitation and that it was by the will limited over to the defendant in case of the lady Anne's marriage without consent, *pari passu* to her dying without issue. And though the civil law may construe the limitation in a personalty over in such cases as this to be void, and to be but *in terrorem*: yet in this court, in the case of inheritances, as this is, nay even in the case of personalty, where it was limited over, as here, this court hath not at any time avoided such limitation over; the constant difference taken in this court being betwixt a condition to make the devise both without limiting over to another, and the limiting over to another; in the first of which cases the court hath usually constructed the condition to be *in terrorem* only because there in no other person appointed to take, as in the case of Sir Henry Balasis now cited, (which you may see before, fol. 22.) But where it hath been limited over, it hath been always taken otherwise; as in the case of Davis against Halton, Novemb. 1664, the matter here being 1000*l.* part of what was given to the party who broke the condition. And so, though it were for a personalty, the limitation over is good.

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Where the legacy on condition the legatee marry with consent, recoverable in equity, notwithstanding the breach of the condition, and where not.
Ant. 22.
1 Mod. 306.
2 Vent. 362.

The Master of the Rolls. There is no difference in this case, whether it be a condition or a limitation, for the penalty is the same in both. And this must be understood to be *in terrorem*; and the infant had no notice of the condition; and so decreed against the defendant. And that the plaintiff, the lady, and the heirs of her body, should hold and enjoy against him.

Appeal.
Lord Keeper.
Ch. Just.
Keeling.
Ch. Just.
Vaughan,
Ch. Baron
Hale.

The defendant appealed from his ailer by a petition, and prayed the entry of it might be stayed; and it was so, and ordered to be re-heard by the lord keeper, assisted with the Lord Chief Justice *Keeling*, Chief Justice *Vaughan*, and Chief Baron *Hales*, 22 April, 1670. At which hearing it was insisted by Serjeant Fountain for the plaintiff, that this was a penalty *in terrorem*, that the daughter might not rashly marry; but she was then an infant, without notice of it, and the earls do approve the marriage.

[141] Serjeant *Maynard* for the defendant. It is a limitation, not a condition. A will would not pass lands by the common law, it is by the statute; and that says the will shall stand. And for notice, the law requires no notice to be given, nor did the earl, the devisor, require any. And who should give notice? The defendant is an infant, and could we give notice? *Mente testatum ratum est.*

Subsequent
assent will not
supply the
want of con-
sent precedent

Mr. Solicitor *Finch* for the defendant. There can be no decree, for the subsequent approbation works nothing, and was extorted by compulsion. For when the earls were first acquainted with the marriage, they disallowed it, and the estate devested out of the lady by the marriage without consent, and subsequent assent cannot revest it. The primary intention was *in terrorem* to restrain the lady from an imprudent disposal of herself; but the secondary intention was, that if she did marry without consent, she would lose the lands. The grandfather could not have settled it stronger than he hath: and that the grandfather may impose such condition on his children, is not to be denied. And if this court should relieve against it, it is to encourage disobedience in children to parents. And this is a case purely at law, and the matter of notice and other circumstances are all to be considered at law as well as here; and if not revlieveable there, it is the same here, and if notice is necessary, as I conceive it is not, that is purely at law; and possibly it may be found at one trial that there was not notice, and at another it may be found there was notice; and it being matter of inheritance and freehold, the defendant ought to be at liberty to try it *toties quoties*.

A condition
may not be
performed in
all circum-
stances, and
yet berelieved
here.

Agreement of
parties cannot
prevent a
court of equity
in its jurisdic-
tion.

Serjeant *Fountain*. A limitation may be at law, and yet relievable here: as, if the condition be to have the consent in writing, and the consent is had without writing, this court will help in that case. And he doubted whether a father can so provide or limit an estate, as that a court of equity shall have no power over it; for it cannot be so provided by agreement of parties. in case of a mortgage, that this court shall not give relief; and equity is part of the law of England. And there are emergencies and cases which a man cannot

provide for : as, suppose the plaintiffs had sent to the parties for their consent, and the messenger never went, but said he did, and had their consent, and upon this she had married, [142] she should certainly be helped in equity. And the end of the will is performed ; she was to marry such person as the Earl should like of, and they have approved, and so the substance is performed ; and whether it be a limitation over of personal legacies, is void by the civil law, I grant ; but that in some cases of a limitation over there may be equity, it clearly follows in this, upon the circumstances of infancy, and not notice and assent subsequent.

Equity regards the substance, and not the ceremony.

The court would see precedents ; and then 30 May, 1670, upon perusal of all the precedents, the whole court agreed in one uniform opinion to dismiss the bill, and accordingly it was dismissed.

Chief Baron Hales argued thus :

1. It is to be considered whether this be a good condition or limitation ?

2dly. Whether any relief be to be given against it ?

3dly. Whether upon the circumstances it is relievable here ?

1st. He conceived it a limitation and condition both in law and equity, because it is collateral to the land ; she may marry if she will ; but if without consent there is a penalty.

2dly. It is a condition, because it is to contain the party in that due obedience which law and nature oblige her ; and she should have applied to her grandmother for her consent, though there had been no such condition. And although in the civil law, in the case of a mere personalty, the limitation over to void : yet this is a devise of the lands not governed by that law.

Estates governable by the law of this kingdom, without relation to another form, ought not to be influenced by another law ; and this being a good condition, it cannot be in law defeated ; and there being a full breach of the condition, as law will not, equity cannot help. And as to the objection, if there may not be relief against breach of conditions in equity, there will be a great shatter in decrees already made : this case is not like the case of a mortgage, where the condition is for payment of money, because there if the money be not paid at the day, there may be a compensation made by payment at another day with damages.

Estates governable by the common law ought not to be influenced by another law.

3dly. Again, this breach is not relievable in equity, because it is a voluntary disposition throughout, both in *equali gradu*, as to the settlement, and as to the blood of him that made the settlement. And it appears by the will of the

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The breach of a condition an-

nexed to a voluntary disposition, not relievable in equity.

Tamen quære. The two cases of Peyton and Shipham, and Cook & Tooke here cited for precedents are otherwise.

No collateral averment to be received to expound a devise of land.

Whether notice be necessary to be given of a condition annexed to an estate to the person to whom the estate is given.

Earl of Newport that made the settlement, that he did as really intend it should go over for marrying without consent, as the lady's dying without issue. And he rests much on it, that there is no precedent of any relief given in this case; for upon view of all the precedents, he doth not think any of them come to this case; and it is not fit to go further than the court hath gone already; for if they should, there would be no end, and it is fit to set bounds. And as to what was offered from the proof, that it was the earl's intention that the lady should have Newport House, and that therefore it was in *terrorem*; he said, that no collateral averment to expound the will ought to be admitted; for if there should, there would be no certainty in any case. And as to the earl's approving the marriage since, he said they were charitable therein; and though equity will favour infants, yet an infant may be bound by law to a performance of a condition; and inasmuch as this condition is annexed to an act (marriage) which she as an infant might do, the infancy will not help. And as to the point of notice, I will not determine here whether notice be requisite and necessary; for that is at law, and want of it, if necessary, will avail there. I will not say what equity may do in case of want of notice; but that fact is not settled whether notice or no. It would be hard, because there is not full notice proved, to conclude here is no notice; and so would have the bill dismissed.

Keeling agreed, and said, it is fit to keep those bonds which parents impose to hold their children at obedience, strait, and not fit for a court of equity to relax them.

Vaughan. As to the consent subsequent, that signifies nothing; for a man cannot be said to consent to a thing which is not capable of consent; as, to say a man consents that his hair is of such a colour, is nonsense, for that is not an object of his consent; and after the marriage their consents signify no more in that case.

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The Lord Keeper declared, he was clear of opinion that equity ought not to interpose in this case, and was glad to see that a parent could settle his estate, that it might be out of a power of a court of equity; and so the bill was dismissed.

Note, that upon trial, and an argument after this hearing in the King's Bench, it was adjudged that notice was not necessary to be given.

The precedents cited in this case were, Sir Henry Bellasis, fol. 22. Fleming and Walgrave, fol. 58. Wallis and Crimes, fol. 89. Escot and Escot, 7 Feb. 1653. Cooke and Tookey, 24 May, 15 Car. 1. Peyton and Shipdam, Nov. 1657. The two last cases were, whether relief were given for the breach of a condition on nonpayment at the day, on a voluntary de-

vise, there being no damage but what might be made up by payment after with damages?

THE LORD KEEPER.

Davy against Davy. December 11.

The plaintiff was eldest son by a second venter, and the defendant was eldest son and heir by the first venter; and the bill was, to be relieved for a rent-charge of 200*l.* per annum, of which there was half a year due.

The bill did suggest, that the defendant kept not any stock upon the ground, but converted it all to tillage, so that the plaintiff had not a sufficient distress, and so was without remedy save in equity, and prayed a decree against the defendant for the arrears and growing payments.

The defendant demurred for that the lands only being charged with the rent at law, there was no equity to charge the defendant's person.

But this demurrer was over-ruled, it being laid in the bill, that there was a legal defect in the assurance, which ought to be made good in equity, the grant being on a good consideration.

The defendant answered, and denied the converting the premises always to tillage, or that the same were not avert to a distress; but said there had been divers times a stock worth 250*l.* upon them. [145]

After proofs published in the cause, it was heard before the Lord Keeper, 20 Nov. 1666. And the only equity there insisted on for the complainant was, that the defendant employed all the lands to tillage, so that the plaintiff could not distrain, there being no cattle kept on the premises. But the defendant did insist, that he did keep a stock of cattle thereon sometimes worth 250*l.* at a time, and that the plaintiff endeavoured to charge the defendant's person with the rent, which was not liable at the law. But the plaintiff's counsel replied, that though possibly he might have remedy at law, yet it was usual to settle matters of this nature in chancery.

Whereupon, and upon reading the proofs in the cause, the court declared they would be attended with precedents where cases of this nature had been relieved, and then would give their opinion. 8 Nov. 1668. the court ordered the cause to be set down again on the precedents, which the plaintiff was to deliver to the defendant. The precedent was this: Seymour Boreman and Francis Yeat plaintiffs, against John Yeat, Esq. defendant. The bill was grounded upon an agreement

A rent was charged upon the land, to be decreed in equity against the person.

Bowman Boreman against

20 Jan. 1660.

made upon the marriage of John Yeat, the father of the plaintiff Francis, with Frances his mother, and a tripartite deed 15 Car. I. in pursuance thereof, whereby John the father became seized in tail, and after the death of Thomas his father, covenants to levy a fine, to the intent Elizabeth (mother of Frances, his second wife, after the death of Thomas and himself) and her assigns should have during her life out of the premises 150*l.* per annum, if John should have heirs-male of his body that should so long live; and to the heirs-male of the body of John by the said Elizabeth; another 150*l.* per annum, during the life of the said Elizabeth; and that the heirs-male of the body of John and Elizabeth have 300*l.* per annum out of the premises, with a clause of distress; and a covenant to make further assurance. A fine was levied accordingly, August 1663. John the father died in the life of Thomas his father. Elizabeth sold her right to the 150*l.* limited to herself after the death of Thomas, to the plaintiff Boreman, and in October before the bill Thomas died, whereby the plaintiffs became entitled to the several rents, the lands descending to the defendant as heir to his grandfather, being eldest son of John by a former venter, and he had all the deeds, and refused to pay the rents, pretending the lands were not sufficient, and the limitation in law defective; and the lands lying intermixed with others, and boundaries confused, the plaintiffs could not distrain, and so prayed relief here. And charged also, that the defendant's father agreed, that if the lands were too small in value, or defective in title, he would make both good. To have that done, and to discover the buttals and boundaries, and to have the rents arrear and growing rents paid, was the scope of the bill.

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Confusion of bounds of lands out of which a rent charge issues proper matter for relief in equity.

The defendant by answer insisted, that the plaintiff's proper remedy was at law, and that Boreman had not a good title, because he had not any attornment, for aught appeared, or any good conveyance from Elizabeth, and justified the detainer of the deeds.

On the first hearing, 25 Jan. 12 Car. II. ordered a commission to go to set out the lands, and Boreman's title to be determined on the return of the commission. The commissioners certified that they had set out the lands, the present rents whereof were but 70*l.* per annum, and that the lands charged were 300*l.* per annum; and then the cause came again to be heard before the Lord Chancellor and the two Chief Justices, 12 Jan. 1660; and as to Boreman's title as assignee to Elizabeth, by which he claimed the arrears from Thomas Yeat's death, during Elizabeth's life, the matter stood upon was, that he did not prove he had paid any purchase-money.

The court conceived that was not material, he claiming under Elizabeth, who was entitled by the marriage agreement, and so capable of relief.

A limitation to heirs-male taken in equity as a limitation to the first son.

And the next point was as to the other plaintiffs to 100*l.* per annum during Elizabeth's life, and 300*l.* after to him and the heirs-male of his body. Whereupon the court declared, that though the limitation of these rents were defective in law, so as the plaintiff could have no remedy at law, yet, by the true meaning of the marriage-agreement, the plaintiff Francis is well described to take the rent, and both the plaintiffs well entitled, and ought to have relief so far forth as the lands and rents reserved on the leases, and the lands as they shall come out of the lease, shall be of value to make good the same; and that Boreman ought to be first paid; and decreed the same accordingly, and the defendant to account for the mesne profits, &c. And for the future the rents reserved and lands out of which the rents and profits are issuing, at the highest yearly value, not exceeding 200*l.* per annum, after the leases expire, should be liable to the payment of those rents to the plaintiff Boreman during Elizabeth's life, and after 300*l.* per annum to the plaintiff Francis, according to the true meaning of the deed.

A defective limitation in point of law supplied in equity.

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The difference between the two cases was;

First, in the principal case the rent was well limited to the plaintiff in point of law by the name of the first son of the second venter, and he may distrain, and having seisin, may bring an assize. But in Boreman's case, neither himself had any remedy at law for want of attornment, and by reason of intermixture with other lands, nor had the other plaintiff, by reason he was not heir-male to his father; but that defendant was by a former venter, so the limitation was not good in law. And observe in Boreman's case the lands only are made liable, not the person.

Another precedent delivered by the plaintiff to the defendant, was 22 June, 1644. Elizabeth Ferris against Newby, where an annuity being devised by will, and by the same will the same lands devised to an half-brother of the devisee of the annuity, this being a rent seck without seisin, and no power of distress, and the devisee of the lands having promised to pay it; the court did decree the devisee of the lands to give seisin of the rent to the devisee of the annuity; which case, as was conceived, was against the plaintiff in the principal case, it being in his power to have seisin when he would. And the court in this case did not decree the lands to be liable.

Moor. 806. Pl. 1092.

Latch. 146.
1 Roll. Abr. 378.

Pl. 22.
4 Leon. 184.
Ant. 79.
Post. 185.

Seisin decreed of a rent seck.

And now, upon further hearing of the principal case, the plaintiff's counsel did not think fit to insist upon, or so much as to mention their precedents, but stood only upon the defect of a distress, and that the arrears of the 200*l.* per annum were now 100*l.* and the land but 200*l.* per annum.

Found to him-
self a distress,
was tried.

The Lord Keeper declared on the debate of the principal case, that unless there did appear a fraud to hinder the plaintiff of his distress, he could not have relief here; and that all he could do was to refer it to a trial at law, whether there was any fraud to hinder the plaintiff of his distress? and accordingly at the plaintiff's desire did refer it to a trial.

The LORD KEEPER.

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Trecor against Perryor. December 14.

On a Demurrer.

The plaintiff was an executor to an obligee, and the bill was to have an equity of redemption, which descended to the heir of the obligor by his death, made assets in equity.

To this bill it was demurred in Benner and Box's case; and on debate the Lord Keeper inclined to think it all one with that case.

Whether an
equity of re-
demption in
the heir of the
obligor be
assets in
equity.

But for the plaintiff it was insisted, that that case was a hard case to be established in a court of equity; and that this is a stronger case, for here the lands were once in the obligor, and never absolutely put out of him, but conditionally by way of pledge for money; and the equity of redemption he had was as considerable as the redemption, which was assets at law. So the Lord Keeper ordered to answer; but saved the benefit of the demurrer to the hearing of the cause.

The LORD KEEPER.
Justice WYLD.

Huttoft Grove against Banson and his wife, and Thomas Grove. December 14.

Huttoft, the plaintiff's grandfather, possessed of a great personal estate, gave the plaintiff 5000*l.* and 500*l.* to his sister, Banson's wife, and made the defendant Thomas Grove his executor, who had purchased the manor of Beeren-Hall with part of the testator's money, and mortgaged it to Perryor, and forfeited it. Upon the marriage of his daughter to Banson, he agrees her portion to be for legacy, interest,

and what more he would give her 1000*l.* and enters into a statute to Banson for the same, and then he grants the equity of redemption and the reversion (for the mortgage was but for a long term of years) to Banson as a farther security. The bill was to be admitted to redeem the mortgage, and to have the legatees lose in proportion. And though Banson had a statute and mortgage *prout*, whereby it was said his 1000*l.* continued no longer a legacy, but was as much a debt to him, as if he had lent the money; and he took it as so much portion, or else he would not have married: yet the lord keeper declared, that inasmuch as the legacy was not paid, but only secured, he conceived it equitable for each legatee to lose in proportion, there not being enough of Thomas Grove's estate to pay all, and would not abmit Banson to redeem, but the plaintiff, for that his was the greater debt; and so ordered that he should redeem, and Banson should lose of his wife's portion in proportion with the plaintiff. And in this case the case of Pick and Vincner, 1639, by advice of civilians, was cited, where it was resolved, that an executor was not bound to pay a legacy, but on security to refund, in case there should be a defect of assets to pay debts and legacies. But that, as was said, was not applicable to the principal case: for the testator had left ample assets, but Thomas Grove had wasted them, and was insolvent.

Legatees abate in proportion where there is not enough to pay all.

An executor not bound to pay a legacy without security to refund in case of defect of assets. Vide the case of Pick and Vincner more largely in Grove and Benson.

THE LORD KEEPER.

Higgon and others against Syddal, Calamy, and others.
December 15.

On a Plea.

The case was this: Syddal granted a rent-charge of 300*l.* per annum for 2000*l.* to the plaintiff, and after mortgaged the premisses for 1200*l.* to Calamy. Then those that have Calamy's interest, he being dead, buy in a judgment precedent to the grant of the rent-charge. The plaintiff exhibits his bill to discover what estate the defendant claims, and chargeth that Calamy had notice of the plaintiff's rent before his mortgage.

2 Vent. 337, 338.
Hard. 173.
2 Chanc. Cases, 208.
1 Chanc. Cases, 202, 162, 163, 36, 201.
2 Chanc. Cases, 20, 35, 213.

The defendants plead the mortgage to Calamy, and that afterwards hearing of precedent incumbrances, they bought in a legal title precedent to the plaintiff's, and offer that if the plaintiff will pay all due on the mortgage, and on their new acquired title, to assign all to him. But if he will not, they stand upon it they ought not to discover what that estate

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A mortgagee without notice of a precedent incumbrance, buys an incumbrance precedent to

that, he shall not be impeached in equity, but on payment of all which is due to him on both estates.

is they have bought in, nor ought their title to be drawn under examination in equity; and by way of answer denied that to their knowledge or belief Mr. Calamy had any notice of the rent charged when he lent 1200*l*. And on debate the plea was allowed as good.

The LORD KEEPER.
Justice WYLD.

William Style, by Original Bill, against William Martin and Elizabeth his Wife, Relict and Administratrix of Richard Bosvile Esq. and Robert Bosvile, Son and Heir of the said Richard, by Guardian. December 16.

The bill was an original bill to set aside a decree in 1664, obtained by the defendant on a bill of reviver (to which the now plaintiff is no party) against John Style, heir of Sir Humphrey Style, and others, as obtained by fraud. The case was thus :

Sir Humphrey Style's lady (mother of the said Richard Bosvile) had by his request mortgaged a manor of her's for 3000*l*. borrowed by sir Humphrey 8 Novemb. 8 Car. 1. And sir Humphrey had agreed with his lady, that if he did not pay off that 3000*l*. that then his lands in Kent should stand obliged to pay 1500*l*. of the 3000*l*. for the ease and benefit of the said lady and her heirs. And 15 Novemb. 8 Car. 1. he conveyed his Kentish lands to trustees, which the defendants say was for that purpose, but no such express trust. Trin. 1641. The lady Bosvile being dead, Richard Bosvile her son and heir exhibited his bill against sir Humphrey and the trustees of the Kentish lands, to have the benefit of this agreement. And in Trin. 1642, two witnesses were examined to the proof of the agreement against sir Humphrey Style, and that the conveyance of the Kentish lands was on that trust. The wars coming on, there was a rest, and no farther proceedings till 1663. In 1665, Richard Bosvile, who was a recusant, died, his heir then and yet an infant. Michlmas 1663. Martin & Uxor, and the other defendant, the infant, brought a bill of reviver against John Style, the heir of Sir Humphrey, and the heir of the surviving trustee. And in 1664, after the answer of John Style, who by answer said he was willing the plaintiffs in the bill of reviver may have their money, if he may have the rest of the lands, and replication and farther proof taken and published, it was decreed, that the plaintiffs in the bill of reviver should hold the lands against John Style and his heirs, and all claiming

under sir Humphrey Style since the first bill, until the 1500*l*. with costs and interest were paid off. Of which bill of reviver the now plaintiff had due notice given him, and he might, if he had pleased, come in by a cross bill, &c. before the decree. The now plaintiff made title by an intail of Sir Humphrey Style on him in 1638, precedent to the original bill, so that title was not bound by the decree; but that settlement being in truth revoked in 1643, he made another title by the will of Sir Humphrey Style in 1658. And for the now plaintiff it was insisted, that there was a collusion in getting the decree, the defendant John Style admitting it by answer to it on the matter, and the now plaintiff, who was terr-tenant, no party to it. And the report of the master who had computed the 1500*l*. and interest to amount to 3600*l*. was confirmed without any defence by John Style. And the rule for binding titles *pendente lite*, (which is the rule of the practice at this day) was the Lord Bacon's rule, and that rule is: That *lis pendens* binds, if it be in full prosecution; but here was above twenty years cessation, and the plaintiff had in that time bought in incumbrances, and improved the lands, and the notice given the plaintiff of the bill of reviver was too late, issue being joined, so that he could not come in. And it is said where judgment is obtained against the land, and the terr-tenant is no party, a writ of deceit lies for the terr-tenant; and so in a parity of reason this bill was maintainable for the now complainant. Spencer's Case, 5th Report, was cited. And it was further said for the plaintiff, that there was no such agreement between sir Humphrey Style and his lady as the decree was grounded upon. [152]

For the defendant it was said, that the plaintiff was stopt to say there was such an agreement by decree.

Lord Keeper. A stranger may falsify at the common-law; and if the decree be by fraud, the plaintiff may then be admitted to falsify the agreement. But it is not form, but the substance of a decree, that all be bound that come in *pendente lite*. A stranger being bound by a decree gotten by fraud may falsify it.

But the Defendant's counsel insisted, that there was no fraud; for the main witnesses which were to the agreement were examined in Sir Humphrey Style's life-time. Those which were examined after, were to prove the payment of the 3000*l*. the mortgage-money, which was paid afterwards; and notice was given to the now plaintiff before any examination of the bill of reviver, and could go no otherwise, unless they would have betrayed the infant; for if he had gone by original bill, they must have lost the witnesses examined on the first bill. All that come in *pendente lite* are bound by a decree.

Notice given a stranger of a bill of reviver necessary, it is improper to make him a party, not being in privity.

Lord Keeper. The war and infancy excuse the laches, and the witnesses to the main were examined in Sir Humphrey's life; and so the pretence of the plaintiffs improvement, and taking off incumbrances, nothing of that in the bill, but in the replication: and so dismissed the bill.

Sherman against Withers. December 11.

On a Plea.

Exception in the statute of limitation as to merchants accounts extends not to inland-merchants.

The plaintiff was an inland-merchant, and the defendant his factor; and the bill was for an account of fourteen years standing.

To all but what was within six years before the bill the defendant pleaded the statute for limitation of personal actions, 21 Jac. 16. c. And upon debate of the plea, the Lord Keeper conceived the exception in the statute as to the merchant's accounts, did not extend to this case, but only to merchants trading beyond sea.

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The LORD KEEPER.

Sir Jeffery Palmer, the King's Attorney-General, on the behalf of Woolrich, a Lunatick, against Woolrich. Mich. 1669.

A bill brought by the Attorney-General in the nature of an information, for the benefit of a lunatick, as in the case of Jerome Smith, fol. 112.

Where a lunatic must be a party to a suit for his own benefit. Aliter in case of an idiot.

The defendant demurred, for that the lunatick was no party, which was ruled a good demurrer; the Lord Keeper declaring it was as needful to make the lunatick a party as an infant, where a suit was on his behalf; but in the case of an idiot it must be otherwise; but a lunatick may recover his understanding, and then he is to have his estate in his own disposing.

But observe the deference between this case and that of Smith's.

Smith's case was, to be relieved against an act done by the lunatick in assigning a debt, because he was a lunatick at that time; so that if he had been a party, it had been to stultify himself, which the law does not admit. Vide Beverly's Case, 4 Rep. And *quare*, how it can be done by information on his behalf?

But in Beverly's case the king hath the custody of his person, of his lands, and his goods, so as to provide for the ideot, to prevent an alienation; and therefore by *scire facias* may avoid a feoffment and other disposition made by the ideot. But the book says, that that is not a breach of the rule, that a man cannot be admitted to stultify himself, because the ideot is not party to the record in a *scire facias*. And in that case it is the same thing, and the writ the same as to the alienation of *non compos mentis*, or a lunatick, or of an ideot, and the king shall protect those that cannot protect themselves. And the alienation of a *non compos mentis* as well as of an ideot, being found by office shall be avoided. *Tamen quære*. And-upon that ground I suppose it was those bills were grounded; for it was declared by the court, that those bills were proper to be brought by the attorney. And in Woolrich's case the bill was, to be relieved upon a marriage agreement, for the benefit of the lunatick, before he was a lunatick; so that he being a party to that bill, did not tend to stultify himself, and may be the reason why he should be a party to it: and the other bill tending to stultify himself, may be a reason why he should not be a party to it.

Where a lunatic shall be a party to an information on his behalf, and where not.

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THE MASTER OF THE ROLLS, in the absence of the
LORD KEEPER.

Cadwallader Jones, Esq. against John Lenthal and his Lady.
Mich. 1669.

The bill was, to be relieved for a debt owing by bond from Sir James Stonehouse, to whom the defendant the lady was his executrix; which debt and bond the plaintiff in his answer to a former bill had sworn was fully satisfied to him, but that was to avoid a sequestration of the debt, as was alleged. And the Master of the Rolls, though that answer was set forth in the defendant's answer in this cause, would not suffer the answer to be read against the plaintiff, and so decreed the defendants to satisfy the debt.

1 Mod. 141
305.
1 Roll. Abr.
374. N.
Pl. 2.
Relief for a debt which the plaintiff had sworn was satisfied before answer.

DE TERMINO SANCT. HILL.

Anno Regis 21 & 22 Car. II.

IN CANCELLARIA.

The LORD KEEPER.
Justice MORETON.

On a Demurrer.

The cause had been formerly heard in the Exchequer, where two several trials had been directed, will or no will? and in both a verdict for the plaintiff. Yet the Chief Baron had dismissed the bill there, but without prejudice in law or equity. And now by an original bill the plaintiff hath sought relief here for those matters he sought relief in the exchequer, and to examine witnesses in order thereunto, in *perpetuam rei memoriam*.

The defendants pleaded the examination and dismissal in the exchequer, and that there ought not to be a new examination, the matter having been there full in issue.

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Dismission of
a cause with-
out prejudice
in law or
equity, how
to be under-
stood.

Matters for-
merly exam-
ined in the Ex-
chequer, may
be new exam-
ined in
Chancery.

On the first hearing of this demurrer the court gave time to search for precedents, where after a cause heard upon the merits, and dismissed in the Exchequer, a new bill had been admitted here: and none being to be found, now upon farther hearing of the demurrer, it was for the plaintiff insisted, that this was a special dismissal, it being without prejudice either in law or equity; which words must be considered to signify something; but they did not signify any thing, unless it were meant the dismissal should not hinder the plaintiff from seeking his relief in any other court of law or equity. And so the court did conceive, and ordered that the plaintiff might examine any witnesses that were not examined in the Exchequer; and that as to the matters examined unto there, the plaintiff might examine the same witnesses *de benne esse*; aid how far those *de bene esse* should be used, the court would farther consider.

The MASTER OF THE ROLLS.

*Bridget Dennis, by Sir Alexander Frazer her committee, against
Sir Thomas Badd, Frances Dennis, his daughter, and others.
January 31.*

The case of Sir Thomas Badd was, that he was guardian to Edward Dennis, (whose sister and heir the plaintiff is) and

at fifteen years of age married him to the defendant Frances, his daughter. Sir Robert Dillington had a mortgage of 200*l.* of part of the infant's estate, which mortgage Sir Thomas Badd paid off, and took the same assigned to other persons. The infant after, at seventeen years of age, made his will; and the defendant Frances his wife executrix. The bill was, that though Sir Thomas Badd had paid off the mortgage with the infant's own money, yet he now pretends it was not for the benefit of the infant, but that he paid it with his own money; and for what money he had of the infant's, he was accountable to his own daughter, the executrix, and so would leave the whole mortgage money still on the mortgage lands, which belong to the plaintiff as sister and heir to the infant.

The defendant, Sir Thomas Badd, by answer said, that the money he had paid Sir Robert Dillington was his own money, and that he had not near enough of the infant's to pay the same; and that if he had had enough of the infant's money, yet he could not justify the disposing of it. [157]

It was proved, that when Sir Thomas Badd paid off the mortgage, he called in about 100*l.* of the infant's money, and that that was applied that way.

And in this case the master of the rolls declared, that Sir Thomas Badd ought to employ what he had of the estate of the infant, as far as it would go, to pay his debts, and did decree a redemption of the mortgage, and that Sir Thomas Badd should account; and that what he had of the infant's in his hands when the mortgage was paid off, should be applied in discount of mortgage money, and upon payment of what was more due to the plaintiff, to redeem.

An Infant's estate in his guardian's hands ought to be applied to pay his debts.

THE LORD KEEPER.

Sir Jeffery Palmer, *the King's Attorney General on the behalf of the King and Trinity College in Cambridge, against George Newman Esq. February 10.*

The information suggests, that S. Newman was seised in fee of the lands in question, and possessed of books and goods, and out of a pious intent to provide for maintenance of poor scholars in that college, by his will in writing devised to the masters and fellows of that college, the lands in the information mentioned, and all his moneys, goods, &c. and appointed the premises to be employed for buying lands for maintenance of scholars in the said college, &c. with this clause, that if any by cavillation concerning the law of maintenance should go about to hinder this bequest, or if any of his bequest

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might not be suffered to go to the college, then the defendant should enjoy all his lands, goods, &c. That by the will the premises are to be established with the college, but the defendant combines with others unknown, either lords of whom the lands are holden, or heirs at law, and pretends that by the statute of Mortmain the devise is ineffectual, and so raiseth cavils to defeat the charity, and so has got the possession of the lands and goods, and refuseth to let the master and fellows have them; that if by the statute of mortmain the said charity be avoidable, yet by other laws for establishing of charitable uses, and according to equity, the charitable use ought to be made good. Wherefore, and inasmuch as the preservation of charitable uses is of public interest and concern unto his majesty and the college, and in respect of the statute of mortmain and cavillation aforesaid, they have no remedy, by reason of the latter clause of the will, to be relieved in the premises, they exhibited this bill.

The defendant answered, and confessed the will, &c.

And upon the hearing it was declared by the court, that the king as *pater patriæ* may inform for any public benefit for charitable uses, before the statute of 30 Elizabeth for charitable uses. But it was doubted the court could not by bill take notice of that statute, so as to grant a relief according to that statute upon a bill, but that the course prescribed by that statute by commission of charitable uses, must be observed in cases relievable by that statute. But no positive opinion was delivered, for the defendant consented to a decree, and so what was done was by his agreement, and not the judgment of the court.

The King as
pater patriæ
may inform
for any public
benefit.
Statute of
charitable
uses.

DE TERMINO PASCHÆ.

Anno Regis 22 Car. II.

IN CANCELLARIA.

Wilmer and his wife, against William Kendrick and Joseph Vylet. May 17.

On a demurrer.

William Kendrick seised in fee of the lands in question worth 90*l.* per annum, and of other lands in all worth 100*l.* per annum, by indenture 23 April, 17 Car. I. conveys the lands in question to the use of Thomas his eldest son for life, the remainder to trustees for 99 years, for the benefit of Martha the wife of Thomas for a jointure; the remainder of those and all other the lands (of which by that settlement Thomas was tenant for life) after William's death, to the first son of Thomas in tail; Thomas has issue Martha the plaintiff's wife, and another daughter, and the defendant Kendrick, his only son. And by the settlement there was a power given to Thomas at any time during his life by any writing to convey or appoint all or any of the lands in question, being but 90*l.* per annum, to any future wife that Thomas should marry, for a jointure, or to any child or younger children of Thomas, so as that conveyance or appointment be made to commence after the death of Martha (Thomas his wife) for life or lives only of such child or children, and for their preferment: Thomas having no other way to provide for his daughter's younger children, 5 May, 1657, for love, &c. to them, and for provision of portions for them, grants, bargains and sells the lands in question to the defendant Vylet, *habendum* to him and his assigns for the lives of the plaintiff Martha and her sister, and for their only use and benefit, to remain from the death of Thomas Kendrick and Martha his wife.

Touching a defective execution of a power.

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The plaintiffs by their bill suggest, that the plaintiff Martha had no provision but this, and that her father did look upon it that he had well pursued his power in the grant to Vylet, or else that he would have taken the wood of other lands of greater value, which he knew were by the settlement *supra* to come to the defendant, and complained that the defendant taking advantage that the power was not literally pursued, did stand upon it, whereas it was in substance

pursued, and the estate granted to Vylet was less than by the power Thomas had power to grant; for by the power he was to grant to commence on the death of Martha his wife only, and he made it to commence on the death of himself and Martha, which was less than he had power to do; and the mistake did happen by reason that in the settlement the lands were limited to Thomas for life, the remainder in trust for a jointure for Martha.

A defective execution of a power raised by a voluntary conveyance without help in equity.

And it was charged by the bill, that in equity the mistake and defect ought to be helped, the younger children being otherwise utterly unprovided for, and so to be relieved was the intent of the bill.

To which the defendant Kendrick demurred, for that the deed of settlement, and deed to Vylet was void in law; and being defective in the execution of the power, it ought not to be supplied in equity. In the arguing of which demurrer it was insisted, that both the conveyances being voluntary, the case was the same here as at law, and no reason to help here against law at all. And it was said, that if such defects should be supplied in equity, it would be in vain to employ men of skill in drawing conveyances and settlements; but every unskilful man might do it as well. But if it had been a consideration of money, it was admitted it might be otherwise. And it was farther insisted, that it did not seem to be a mistake in the case, but dono designedly; for if the estate had been to commence upon the death of Martha, Thomas' wife, then Thomas himself had lost his own estate for life after Martha.

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Vide the case of Parvey and Bowen, f. 22.

The court was all of opinion, that the law being against the plaintiff (as it was admitted it was) equity could not help the plaintiff. Yet they did mediate with the defendant to pay the plaintiff Martha 20*l.* for her life.

Prince and his wife against Green. A power to lease raised by a covenant to stand seised, is not good. 4 Leon. 8. 2 Vent. 350. 1 Levinz 238. Ant. 104. Hard. 204. 2 Chanc. Cases 68, 69.

And the cause having been formerly argued on the demurrer, and a day given to the plaintiff to produce precedents where in like case the court had relieved: the plaintiff produced a precedent, 6 July, 40 Eliz. Prince and his wife plaintiff against Green defendant, where in effect the case was thus: The father seised in fee of a great estate, by covenant to stand seised, settles the same to himself for life, the remainder to his eldest son, with power to himself to lease a small part for forty years, who accordingly made a lease for the benefit of a younger child, which came by assignment to the plaintiff, which the defendant, the eldest son, would avoid at law, the power not being well raised by the covenant to stand seised. But it appearing to the court the eldest son was greatly advanced by the father, and that the conveyance, which was by covenant, was intended to be by livery, which he was advised

would be as well by covenant, the court did decree the plaintiff should hold until the defendant evicted him by law, and did decree the defendant to admit the power to make the lease good in law, if he did not prove an intail paramount the settlement, as he pretended.

A defective power made good in Equity

The LORD KEEPER.
Chief Baron HALES.
Justice RAINSFORD.

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Elizabeth March, Richard Chaworth and Henry Malory, Executors of Jane Duppa, against John Lee, Senior, and John Lee, Junior. May 80.

The cause coming to be heard, and argued on a plea before the Lord Keeper, he directed a case to be stated, and then would farther consider of it. And now the case being stated, it was thus :

Mortgage.
Vent. Rep. 2
part 337, 338
Hardr. 173.
2 Chan. Cases 20, 35,
208, 213.
1 Chan. Cases 36, 201.

Trin. 1669. The plaintiffs by their bill set forth, that the nineteenth of January, 1662, Henry English, by indenture and fine (wherein the wife joined) conveyed to the plaintiffs Sir Richard Chaworth and Henry Malory, and their heirs, the Manor of Monfield in the county of Sussex, to the use of Mistress Duppa for five hundred years, as a mortgage for the security of 4000*l.* payable the fourth of March, 1664, with interest in the mean time. That on the fourth of March, 1664, Mr. English mortgaged to Mistress Duppa the Manor of Wigsell in the county of Sussex, for five hundred years, for security of 3000*l.* more, payable the fifth of June after, with interest; and covenanted in both deeds, that the premises were free from incumbrances. 6 August, 1664, Mr. English acknowledged to Mistress Duppa a recognizance in this court of 2000*l.* for payment of 1000*l.* and interest. The 7th of December after the 21st of October, 1665, (the mortgages and recognizances being forfeited) Mistress Duppa died before payment, having made her will, and the plaintiffs her executors, who proved the same. Trinity Term, 1667, the plaintiffs having brought several ejectments, exhibited their bill here against Mr. English and his wife, that Mr. English might discover incumbrances, and redeem by a day, or that his equity of redemption might be barred. Where to Mr. English and his lady, after they had stood in a contempt to a commission of rebellion, put in their answer, but did not discover any incumbrances. Michaelmas-Term, 1667, Mr. English suffered judgment in ejectment at the plaintiff's suit, with a *cesset*

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executio till May after. 18 May, 1668, the *cesset executio* being expired, Mr. English, notwithstanding any arguments the plaintiff's counsel could make, obtained an order of this court for stay of the plaintiff's proceedings at law upon the judgment in ejectment till hearing, and another order. 5 June, 1668, the cause coming to be heard, the court decreed that Mr. English should pay what was due to the plaintiffs in a twelvemonth, or in default, the plaintiff's should enjoy the premises discharged of all equity of redemption, against him, and all claiming under him. 26 November, 1668, the master to whom it was referred to take the account, reported 8530*l.* 14*s.* payable to the plaintiffs the sixth of June, 1669. 5 Feb. 1668, the report was decreed, and the decree thereupon signed and inrolled.

The bill farther chargeth, that the defendants designing to elude the said decree, and defeat the plaintiffs of the benefit thereof, and of their judgment in ejectment, pretended that Mr. English had mortgaged to them in June 1665, in fee, the Manor of Wigsal, for the security of 2000*l.* payable the twenty-seventh day of June, 1666, which for non-payment was become forfeited. The defendants having had notice, and being acquainted with the contents of the plaintiffs' bill, and proceedings thereupon against Mr. English, and their securities and titles to the premises, about a week before the same came to hearing, exhibited their bill here against Mr. English and the plaintiffs to discover the reality of their securities, and what was due thereupon, and prayed relief therein upon the title of their mortgage. 20 October, the plaintiff moved the court again, which was between the times of the decretal order, and pending the reference to the master, upon an affidavit that Mr. Burrel and several others had incumbrances on the premises precedent to the plaintiffs, to discharge the order of the eighteenth of May last, whereby their proceedings at law for the recovery of the possession of the premises had been stayed, and that they might be at liberty to proceed upon their judgment in ejectment to recover the possession, which the court however thought not fit to grant, but continued the former order. That the Lees by means thereof ceased the prosecution of their suit in this court against the plaintiffs, and while the plaintiffs were tied up by the order of this court from getting possession, bought in a mortgage made in 1649, by Mr. English to Mr. Burrel of part of Wigsal for 1000*l.* and a statute in 1656, acknowledged by Mr. English to Mr. Burrel of 800*l.* for payment of 400*l.* and have extended the statute on both the manors at not above the third part of the value, and by virtue thereof intend to evict the possession, and to pay themselves as well the 2000*l.* and interest, as the

800*l.* and 1000*l.* and interest, before the plaintiffs shall have any fruit of their decree; and that the defendants ought, and that the plaintiffs have offered them upon their payment to them the 8530*l.* 14*s.* and interest, to assign their securities; or else that the defendants would accept what is due upon the statute and mortgage to Burrel, and thereupon assign them to the plaintiffs; and yet they refuse to do it.

And so to be relieved in the premises is the prayer of the bill.

Mich. 1669. The plea and answer of John Lee, Senior, with the answer of John Lee, Junior.

The defendant, John Lee the elder, to so much of the bill as seeks relief concerning the manor of Wigsel, by setting aside or prejudicing any title he or the other defendant hath, or for discovery thereof until he be satisfied the money in his plea mentioned, for plea saith, that about the one and twentieth of June, 1665, the said English affirmed that he was seised in fee of the manor of Wigsel free of incumbrances; and the defendant finding him in possession, and believing that he was so seised, and knowing nothing to the contrary, in consideration of 2000*l.* paid by him, took a conveyance of the inheritance in fee-simple thereof from Mr. English, in his and the other defendants names, for the security of 2000*l.* payable the twenty-ninth of June, 1666, whereof no part is paid, but the estate absolute. That the defendant at the time of the conveyance or before, had no notice of the plaintiff's securities, or any of them; but long after hearing that Mr. English had incumbered the premises with the plaintiff's securities, and by a prior mortgage to Mr. Burrel for 500*l.* for securing 1000*l.* which was forfeited in November 1649, had incumbered part of Wigsel, and in November 1655, had acknowledged a statute to Mr. Burrel of 800*l.* for payment of 400*l.* which was also forfeited, did by advice of his counsel for securing the premises convey to him and the other defendant, for 1090*l.* by him paid, purchase in Mr. Burrel's mortgage, and agree with him to extend the premises, and for 430*l.* to assign the same as the defendant should direct. That the statute was extended, and the defendant paid Burrel 430*l.* who assigned the extended premises as the defendant did direct. That the defendant made the purchase of Burrel principally to secure his title, and to protect from incumbrances the premises conveyed to him and the other defendant, and to reimburse the several sums of money by him paid, with damages, or at least so much as shall be really due on the said Burrel's mortgage and statute, and demands judgment. And by answer saith,

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that after this purchase, and not before, he heard of the plaintiff's incumbrances, and heard also of Burrel's mortgage and statute; and that before he bought Burrel's mortgage and statute, he had notice of some proceedings by the plaintiffs had in this court against Mr. English touching the premises, but were no parties thereto; but what the same were, referred to records here, and proceedings at law, and thereupon by advice of counsel he did purchase the said mortgage, lease and extent, November 27, 1668. - That the agreement for the mortgage and statute with Burrel was entire, though perfected with several instruments, and the consideration mentioned to be several, and Burrel refused to extend the statute and assign the extent, unless the defendant paid him what was due on his mortgage and statute. The defendant submits, that if the plaintiffs will let him enjoy his purchase lands free from incumbrances, to pay him the purchase money and damages, and will pay him what he paid Burrel, with damages and costs, if he will accept it. The rest of his answer is to the effect of his plea.

John Lee, Junior, his answer.

By his answer saith, that he claims nothing in the premises to his own use, his name being only used in trust for the other defendant, and had no notice of the plaintiff's title a long time after the defendant's purchase, and refers in all things to the plea and answer of the other defendant.

[166] *In this case these queries were made on the plaintiff's part.*

Whether a statute bo't in by a mortgagee ought to be used as to lands not in his mortgage.

I. Whether upon the paying to the defendants what is due to them upon the mortgage and statute to Burrel, the plaintiffs ought not to have the same assigned to them? And if not, whether the statute, being but an incumbrance, and no estate, ought to be made use of as to the manor of Monfield by the defendants, wherein the defendants have no estate, and the title the defendants would protect is but a mortgage or incumbrance, and not to protect the title of an absolute estate?

Whether a mortgagee shall protect his mortgage by incumbrances bo't in against a title he had no notice of before, and under which

II. Whether the plaintiffs having judgment in ejectment for the possession long before the defendants bought in Burrel's mortgage and statute, and after the defendants had notice of the plaintiff's title and proceedings in this court, and notwithstanding their endeavours to the contrary, being stayed by the order of this court from recovering the actual possession, they might be looked on as actually in possession? And in that case, whether shall the defendant make any use of

Burrel's mortgage and statute bought in pending the injunction, and after the decree against English, other than to reimburse themselves the money thereon due? And if not,

the party was then in possession.

III. Whether by the defendant's getting in the statute, in manner as is before expressed, he shall be at liberty to make use of it only against Monfield in the plaintiff's hands, and so force them to pay off the penalty of the statute, or clear the same, which Burrel himself could not have done, but all the lands must have been charged with the satisfaction of Burrel's statute, as well those in the defendant's hands as the plaintiff's?

And these queries were made on the defendant's part.

I. Whether the defendant Lee, being a real purchaser, *bona fide*, of Wigsel for 2000*l.* from English then in possession, without any notice of any of the plaintiff's incumbrances preceding to his purchase, might not purchase in the mortgage lease of Wigsel made by English to Burrel, and the extent of Burrel's statute preceding to the plaintiff's incumbrances, both forfeited in point of law, and protect his purchase of Wigsel till the 2000*l.* and interest be paid? And whether there is any equity against him for the plaintiff any way to weaken his legal securities for enjoying his purchase till the 2000*l.* and interest be paid, admitting that nothing had been due on Burrel's mortgage or statute in equity, and the defendant had paid nothing for purchasing in that mortgage and extent?

A mortgagee may protect himself by getting in an old incumbrance, tho' nothing be due on it.

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II. Whether the defendants having paid to Burrel 1520*l.* for the mortgage, lease, and extent of the statute, shall be restrained from taking the benefit of the law by the said mortgage, lease, and extent, so far upon any the lands of English, in the hands of the plaintiff or any others, to recover what he really paid to purchase in the same, so as they after such satisfaction make no other use of the said Burrel's mortgage or extent, than only to protect his own purchase lands till the 2000*l.* and damages be satisfied?

Whether a mortgagee buying in an incumbrance that chargeth other lands also, shall be restrained from his legal course to reimburse himself the money paid for that incumbrance, so as he use it only to protect his mortgage.

III. Whether the defendant having paid his aforesaid purchase for a valuable consideration, without notice of the plaintiff's incumbrances, and by answer offers to take the mortgage money and damages, and the money paid for Burrel's mortgage, and extent, and damages and costs, and quit the whole, or else to enjoy the mortgage free from incumbrances, and be paid what he paid Burrel, with damages and costs, and make no further use of Burrel's extent, than only to protect his purchased lands from incumbrances: that a court of equity shall give any further relief against him to his prejudice, being a purchaser, without notice; and if any, what relief?

IV. Whether the defendants, who are no parties to, nor at all concerned in the former suits between the plaintiffs and

English, or concerned in any of the orders or proceedings therein, shall be in any sort effected with, or prejudiced by any of those orders?

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2 Vent. 338,
339. Har-
dress 136.
2 Chan Cas.
213.

The court unanimously agreed, that the defendant ought not in any sort be impeached in equity as to Wigsel, but might keep his statute and security on foot to protect his mortgage; and that the proceedings in chancery against English by the plaintiffs, did not at all influence this case. But as to the manor of Monfield, in which the defendants had no estate before they bought in the statute, the court inclined that so much of Wigsel as was not in Burrel's mortgage (for he could not extend on himself) Monfield should be accounted for at the real value, in order to discharge Monfield of the extent, but not so as to prejudice the extent in course of law as to Wigsel: but that the statute ought to protect Wigsel as far as by any course of law it might.

On the argument of this case was produced Higgon against Udal, and Medleton against Shelleh, 19 June, Car. 1. for precedents.

On the hearing of this case, which was a parallel case, the court would be satisfied there by precedents before they would give any relief against purchasers in of incumbrances to protect a real title, and the cause went no farther here. But the plaintiff, as the Chief Baron now said, brought his bill in afterwards, and was there dismissed.

And in the principal case the plea was allowed.

DE TERM. SANCT. TRIN.

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Anno Regis 22 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

The MASTER of the ROLLS.

Hurst against Goddard. June 7.

Things in ac-
tion assigna-
ble in equity,
and how.
Post. 232. 2
Chan. Cases,
7, 37.

The case was thus: There was a sum of money provided by a settlement of lands to be raised for daughters' portions; one of the daughters marries and dies before her portion paid; her husband takes administration to her, and assigns all his interest in that portion to his son by a former wife. The son by this title (the father being dead) sued in equity for this money.

It was insisted for the defendants, that though things in ac-

tion might be assigned here on a consideration by the party that had the interest, and were recoverable here by the assignee; and that a release afterwards by the assignor, unless it were without notice and on consideration to him to whom the release was, would not hurt the assignee; yet here the assignment being by an administrator, and not the person that had it in his own right, this had never been good, for there might be a creditor to satisfy the intestate, &c.

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The Lord Keeper did think there was a considerable difference between the assignment of the party and of the administrator, where the administrator was a stranger, or had not right before, and no colour of right but merely by the administration. But here in this case the administration was *pro forma* only, for here he had a right to the money, as a portion or provision for his wife, and every man hath not ready money to give daughters, but their portions are to be provided for by this means, and therefore it is reasonable to advance or promote the establishing of them, so that they might be disposable by the husband (who settles a jointure) as money itself may be. And so decreed for the plaintiff.

The LORD KEEPER.

The MASTER of the ROLLS.

Martin against Seamore. June 13.

Robert Seamore being seised of the lands being copyhold, in fee, surrenders them to the plaintiff by way of mortgage, for money lent, and in a few days after surrenders them to the use of his will, and then by will deviseth them to his wife for life, remainder to his daughter in fee, and dieth. There was a failer to present the plaintiff's surrender at the court, but the wife got herself admitted.

The plaintiff's bill was to be relieved for this mortgage money, and set aside this surrender and will, being voluntary, unless the wife and daughter would pay him.

For the wife it appeared, there was an agreement of the husband, in consideration of the marriage, to settle the premises on her for life, and insisted that the will and surrender to her was pursuant to that consideration and agreement.

For the plaintiff it was insisted, that if a copyholder for money had agreed to sell or mortgage his copyhold, that by such agreement he stands trusted for the vendee, and that no voluntary disposition afterwards could prejudice the vendee, nor no disposition for money with notice of that agreement: and that the plaintiff having a surrender ought not to be in a worse case than if he had only an agreement.

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A copyholder having for money agreed to mortgage lands stands trusted for the mortgagees.

A surrender void for want of presentment made good against a voluntary disposition.

Court. As to the wife she being in pursuance to a precedent agreement to the plaintiff's title, would not impeach her estate. But as to the daughter, her's being purely a voluntary estate, it was ordered, that unless she would pay the plaintiff his money he should hold and enjoy the premises against her.

The LORD KEEPER.

Justices { TWISDEN,
WYLD,
RAINSFORD.

Ross against Ross. July 14.

The case was this : Francis Ross had issue James his lawful son, and John a bastard son, and deviseth by his will in writing to his bastard son in tail lands that were held in *capite*, and suffers copyhold lands to descend on James. James and John agree, that John and his heirs should enjoy the copyholds, and James and his heirs the devised lands.

Tenant in tail bound by his agreement to convey.

2 Rol. Rep. 434.

2 Vent. 350.

1 Levins 239.

Hob. 203.

1 Rol. Ab. 379.

pl. 7. Post.

236, 236. 295.

The issue in tail is not bound by the agreement.

This agreement being executed, James had a decree against John to levy a fine, and settle it accordingly. John dies in contempt for not doing that (which if he had done the estate tail had been barred.) The defendant, the issue of John, entered into the copyholds, and enjoyed them : and to force him to execute the agreement was the intent of the bill.

Maynard for the defendant. It is not like the case of Octavian Lumberd, for by that agreement the estate tail was made good, which otherwise would have been avoided ; but a personal agreement, or agreement for other lands will not bind the issue.

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Issue in tail agree to convey, he is bound by that agreement. 2. If he die, his issue is not bound by it. 3. That if the issue do accept of that agreement, and enters, as in this case, on the land, it now becomes his own agreement, and shall bind. And so decreed it against the defendant.

Resolved by the whole court, 1. That if the tenant in tail agree to convey, he is bound by that agreement.

2. If he die, his issue is not bound by it.

3. That if the issue do accept of that agreement, and enters, as in this case, on the land, it now becomes his own agreement, and shall bind. And so decreed it against the defendant.

The LORD KEEPER.

George Stowel, Esq. against George Long, Executor of George Long. June 14.

Sir John Stowel (whose heir the plaintiff is) was indebted to the defendant's testator by judgment and counterbound, the defendant's testator having paid the debts he was bound in as surety for him. Sir John was sequestered, and his estate

exposed to sale by the parliament for his loyalty to the late king. The defendant's testator bought a farm of the trustees for sale, part of Sir John's estate, and in the purchase had allowance of his debt by judgment and on the counterbond, and paid the rest of the purchase money, as was usual, by bills, &c. The defendant's testator's purchase was in 1652 and he entered and held till 1660, the king's restoration. He being dead, the plaintiff, who claimed under Sir John Stowel, exhibited a bill to call the defendant to an account, and suggested, that the land was conveyed by the trustees in satisfaction of the judgment, and that by the profits taken the judgment was satisfied, and therefore the plaintiff ought to hold the lands against the judgment which was extended for the defendant.

It was insisted, that for all the profits the defendant's testator took under the sale, it was pardoned by the Act of Indemnity; and that the defendant's testator, besides this judgment and this bond, paid a great sum of money for the purchase. And yet it was offered to come to an account, if the plaintiff on account would pay the defendant's the debt due by judgment and on the counterbond, and the money paid for the purchase. And upon that offer the court decreed it to an account. Though it was for the plaintiff strongly opposed, that the debt Sir John owed him by counterbond (it not being within the judgment) should not be brought into the account, or allowed the defendant. But inasmuch as that debt was allowed the defendant as part of the consideration in the purchase of the estate, the Lord Keeper did order that to be brought into the account and allowed the defendant, and declared, that if the defendant's counsel had not offered to account, he would not have ordered an account, for that all monies received by the profits are pardoned by the act of oblivion.

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A creditor of a delinquent having his debts allowed him in the purchase of the delinquent's estate shall not be put to account for the profits under the purchase in discharge of his debt.

Troner against Hassold. June 16.

The very same case with that of Wembergh and Tough before fol. 123, save that the debt was by bond, and entered into here. And upon a demurrer the Lord Keeper ordered the defendant to answer; but saved the benefit of the demurrer to the hearing.

Whether articles of peace can discharge a subject's debt

THE LORD KEEPER.

Dame Flora Backhouse against Simon Middleton and others. June 17.

Sir William Middleton seised of the king's moiety in the new river water in fee, consisting of 36 shares, 1646, conveyed the same to Henry Middleton and others, upon trust for

Ante. 39.
Post. 208.
2 And. 162.

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himself and his wife, during their respective lives, and after that the trustees out of the rents and profits of the premises should pay his debts and portions for his daughters at certain days, and after to permit Sir Hugh Middleton, heir of Sir William, and his heirs, to take and receive the rents and profits of the premises. Sir William and his lady dies. Sir Hugh in June, 1657, contracted with William Bishop, former husband of the plaintiff, for sale of fourteen shares to him of the king's moiety for 7000*l.* whereof 250*l.* in hand, and the rest to be paid as Sir Hugh and Bishop and the trustees should agree, for the daughter's portions, which are ascertained by Sir William at several great sums. In December 1657, the defendant Simon contracted with the same Sir Hugh by articles under hand and seal, for all the king's moiety at 15,100*l.* and in January after Sir Hugh and his wife and Henry Middleton (the only active trustee) execute a conveyance to Simon according to the articles. In Hillary, 1657, Bishop exhibits his bill against Sir Hugh to enforce an execution of the agreement, which the defendant answered. Hillary 1658, Simon Middleton brought his cross bill against bishop, Sir Hugh and the trustees to have a conveyance, &c. February 1659, Bishop exhibits interrogatories in his cause. November 1660, one witness sworn thereon. 4 March 1660, Bishop dies, yet the witness sworn not examined, Bishop having devised the benefit of his contract to the plaintiff, being his wife, and her heirs. 24 January 1661, she brings a bill of reviver. 24 November, 1662, she marries Sir W. Backhouse, and so her suit abates. 27 November, 1663, Simon Middleton's cause heard and decreed for him. 1 December 1663, Sir William Backhouse by petition gets Simon Middleton's decree stopt. 2 December 1663, he brings a bill of reviver in his own and his wife's name. 18 May, 1664, he exhibits a new schedule of interrogatories, and on those interrogatories some witnesses are examined. 11 June, 1664, this cause was heard, and the plaintiff's claiming as devisee to the plaintiff in the first cause, and the heir of Bishop, whom only it concerned to contest, the devisee being no party; and a devisee not being intituled to a bill of reviver, this bill was dismissed without prejudice to a new bill.

A devise cannot bring a bill of reviver not being in representation to the devisor, but in nature of a purchaser.

Then an original bill setting forth the former proceedings and the former dismission was exhibited by Sir William Backhouse and the plaintiff his wife, which also abated by Sir William's death, and was revived by the plaintiff, and answered by the defendants. And then issue being joined, the plaintiff moved to have the use of the depositions taken upon the former bill, which was dismissed, made use of in this cause, those witnesses being dead.

This matter was several times strongly debated by counsel on both sides, where for the plaintiff it was insisted, that though a bill be dismissed, yet the depositions taken on such bill are to be made use of here at law, and that the bill was not dismissed on the point of right, but for matter of form. And that it is usual and frequent to use depositions taken in one cause, if for the same matter that is in controversy in another, especially if against the same defendant, as here it is; which was admitted by the defendant's counsel. But as to the using of depositions in a cause dismissed, this difference was taken; that though where a cause is dismissed the matter of it not being proper for equity to decree, yet the fact in this cause proved may be used as evidence in the fact between the same parties whenever it shall come in question again. But when a cause is dismissed not upon that ground, but upon irregularity, as for that it comes by reviver when it should come by original bill, so that in truth there was never regularly any such cause in the court, and consequently no proofs, these proofs cannot be used; for proofs cannot be exemplified without bill and answer; nor can they be read at law without the bill, on which they were taken, can be read. But this bill of reviver could not be read at law, and therefore the proofs taken upon it cannot be used here. And so upon long debate, and after several formal arguments it was ruled about Michaelmas term 1669, in this very cause by the Lord Keeper.

And now upon the hearing of this cause, the endeavour on the plaintiff's part was to prove a notice in the defendant of Bishop's contract, which was opposed by the defendant. But the notice being proved, it was for the defendant insisted, that there was no ground to decree the agreement made by Bishop, it being made by a *cestuy que trust* of the surplus only, and the trustees no parties, and the second agreement by the defendant Simon Middleton is exempted before any bill brought by Bishop against the *cestuy que trust*; and the principal trustee (who being examined as a witness swears that he did disapprove of the agreement with Bishop, and would never consent to it. And it was farther insisted for the defendant Simon, that the agreement with Bishop was not pursued, nor could Sir Hugh enforce the payment of the 6750*l*. it being to be paid as the trustees and he should agree, so that that was no complete agreement; and the trustees disagreeing, and having executed the other to Simon the defendant, the agreement with Bishop ought not now to be decreed especially for the plaintiff, who claimed the benefit of it by devise only, which at the best was a devise of an equity on an equity.

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When depositions in a cause dismissed shall be dismissed or not.

Ant. 73, 25.
Post. 333,
236. Kel. 96,
a. 6, 100. a.
Hard. 180.
Post. 229.

An agreement for the purchase with the *cestuy que trust* of the surplus not good unless the trustees are parties.

But for the plaintiff it was insisted, that the trustees had not by the trust power to sell, they being to pay the daughter's portions out of the rents and profits.

A trust to pay portions out of rents and profits at prefixed days gives the trustees power to sell.

To which it was replied by the court, that the trustees were not to pay the portions out of the annual rents and profits, but out of the rents and profits, and those portions were to be paid at prefixed days, which the annual profits would not do; and therefore conceived the trustees might sell for that purpose within the intention of the trust; and so declared he was of opinion to dismiss the bill, but withal said he would think farther of it. *Vide* the end of this cause in Cornbury against Middleton.

THE LORD KEEPER.

Pitt and others against Pelham and his wife, and Mabel Shirly. July 4.

1 Chanc.
Rep. 183.

William Shirly seised of the lands in question, settled them on Jane his wife for a jointure, remainder to the heirs of their two bodies, remainder to his own right heirs. Afterwards in 1657, he made his will in writing in these words: I make my dear wife my sole executrix; my land at Blandford, which my wife's jointure (which is the land in question) I confirm unto her; and after her death I appoint it to be sold, and the money that is made of it, to be divided in equal portions amongst these four, namely: one part of it to be disposed of by my wife, and one to William Major, one to Ezra Shirly (who was heir at law) and one to Jonadab Savidge, and in case any of my three above named nephews shall die before the death of my wife, my cousin Roger Higham shall have the portion of money, which upon selling my land at Blandford should have fallen to that nephew, and dies, leaving Ezra his heir. Ezra Shirly dies before Jane, leaving the defendants the women his sisters and co-heirs. Jane the executrix, Major, Savage and Higham in 1663, exhibit their bill against Mary and Mabel the defendants, to prove the will, and compel them to sell. They answer, and in 1664, witnesses are examined. Pending this suit the now plaintiff being only tenant to part of the lands from year to year, purchases of Major, Savage, Higham and Jane, their interest given them by the will. Jane dies in 1666, and makes Higham and Harris her executors; the now plaintiffs Pitt, Major, Savage, Higham and Harris exhibit their bill to compel the co-heirs to convey the land to Pitt and his heirs.

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The cause was first heard before the Master of the Rolls, and it was then ordered a case should be drawn up and heard before the Lord Keeper.

And on hearing before the Lord Keeper, 7 Novemb. 1668, because the cause appeared to be of weight and consequence his lordship ordered copies of the case to be delivered to Justice Twisden and Justice Wyld, and will advise with them and appoint a day to deliver his opinion.

29 April 1669, the cause was heard by his lordship, assisted with those judges, at which time it was by Sergeant Maynard insisted for the plaintiff, that the will was good in law if the same was executed, but could not compel an execution at law, and therefore equity ought. And as to the pretence that there was no person named to sell, he said, that when the intention is clear, all means without which that cannot be attained must be supplied by a court of justice, Dyer 371. b. 2 Leon. Rep. 220, a case in point, and the deviser hath power to dispose as he pleaseth: and though the devise be not of an estate, but of an authority to sell, it is good within the statute. And if a devise be to an heir upon a condition that he sell, this condition is void; but yet it is good by way of trust in equity, for it lies within the power of an ancestor to charge his lands with a trust, and the heir must sell. And the precedents of the court do run, that the heir is to sell, and cited Batersby and Prince in the Lord Coventry's time, and Tennant against Brown, 18th February, 1659.

When the intention is clear, justice must supply the means to attain it.

A devise to an heir on condition, void in law, yet good in equity.

Sergeant Fountain for the plaintiffs. Originally this is a good will, and the land might have been sold; and if by any accident it be prevented, as by the death of the executor, this court ought to help it. And it is not denied, that if the will had been to sell to pay debts, it had been good, and the heir should have sold: and there is no difference between debt and legacies, and here the money is given for legacies, but shall be raised by the sale; and he relied on it, that the executor might have sold.

Mr. Solicitor Finch for the defendants. There are two questions: 1. What the law is? 2. What the equity? The law is against the plaintiffs. If land be appointed to be sold for payment of debts, and no person is appointed to sell, the executor shall sell, because the soul is concerned, which the executor is to take care of. But it is otherwise in a voluntary disposition, as here; and it is not like the case of Howel and Barns, 1 Cro. 382. for there the executors were appointed to sell.

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When lands are appointed to be sold, and no person appointed to sell, the executors shall sell.

Sergeant Ellis for the defendants. The devise is a void devise in the creation, because no person is appointed to sell; or if good in the creation is void *ex post facto*, for no bond of the ancestor binds the heirs, unless he be expressly named.

The Lord Keeper doubted whether the will be void in the creation; for it is against a rule in law, to make it void, if by any construction it can be made good.

Twisden doubted that the executor of the executor cannot be compelled to sell in this case, the sale not being to be made till after the death of the executor.

Wyld conceived the devise good in the creation, the intent appearing; and the case in Leonard is the very case, and was of opinion, that the executor of the executor shall sell; but doubted whether the heir be compelled to sell.

Precedents on both sides were given in to the Lord Keeper and the judges. And 18th May, 1669 the Lord Keeper after advice with the judges in order to the determination of the cause, ordered a trial of these points in a feigned action.

1. Whether Jane the executrix had power, and could by the will have sold the lands?

2. Whether a sale by her executors (admitting such sale to be actually made) be a good sale?

And after trial either party to resort to the court for a final determination.

Upon the trial by consent of counsel a special verdict was found, and upon several solemn arguments thereon by counsel on both sides at the Common Pleas, the court gave judgment unanimously on both points for the defendants. Thereupon the defendants move to dismiss the bill. And it is ordered that the cause be set down for hearing before the Lord Keeper upon the equity reserved.

[179] And now upon hearing thereof before his lordship, it was for the plaintiff insisted, that it was plain by the will that the lands should be sold, and no person by law can sell but the heir, and therefore the heir must sell; and that matter was not tried, but the matter tried was improper, for it was not to the purpose. And the precedents of the court run, that the heir should sell, and therefore though the other issues tried are against the plaintiff, that is not, but remains in justice for the plaintiff; and cited divers precedents, viz.

Hughes ag't
Collis.

Hughes and others Plaintiffs against *Collis* Defendant. 1
Feb. 16 Car. 1.

The case was thus: The plaintiffs were creditors of the testator. The defendants were his executors, and daughter's legatees. The bill was to enforce the sale of the testator's lands for payment of his debts by the executor (who by answer submit to sell, if the court thought fit, having in truth sold part before.) And the words of the will were thus: as for my lands, tenements, goods and chattels, I give and bequeath, as followeth: after my debts paid, to my five daughters 100l. a piece, and to be paid at their ages of twenty years: also I give to my wife, whom I make my executrix, all the rest of my lands and tenements, goods and chattels.

Portions de-
vised out of
lands payable

The personal estate was not sufficient to pay the debts, nor could the executrix, out of the profits of the premises, being but 63*l.* per annum, raise money to pay the debts and the daughter's portions, being 500*l.* Therefore the court conceived it was intended by the will, that the executrix should raise money to pay the debts and legacies, and decreed the executrix to sell accordingly, and by sale to satisfy the plaintiffs; but before the executrix was to receive any part of the purchase money, she was to give security to pay the daughters their portions at their ages of twenty years (they being then in their infancy) and that the daughters should, when they came of age, release the lands to the purchaser.

at prefixed days, which the premises will not do, amounts to a devise to sell.

Another precedent was,

Lockton against Lockton. 12 Nov. 12 Car. 1.

Where lands were devised to be sold, and the moneys to be distributed to several persons, and no person was named to sell, there by consent of counsel it was decreed that the executor should sell.

Lockton against Lockton.

Another president.

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Ashby and others, creditors of Walker, against Doyl and others, heirs of Walker.

The words of the will were these: my will and mind is, and I do hereby authorize that my executors hereafter named shall sell my lands and woods thereupon growing, to any person or persons, and their heirs, for the best value, and with the moneys thereby raised to pay all my just debts. 16 Feb. 1655. The Lord's commissioners, assisted with judges (the creditors being dead) upon view of precedents decreed the heirs to sell.

Tenant and others against Brown and others. 18 Feb. 1659.

The sale being to be made expectant upon a contingent estate, which did not happen in the executor's time, that was decreed to make the sale; but happening after his death, his executor, and those that claimed the land after his death, decreed to sell.

Tenant ag't Brown.
The executor of an executor to sell when the executor fails to sell.

And for the plaintiff in the original case it was strongly insisted, that it was all one where lands were devised for payment of legacies or younger children's portions, and for payment of debts, and that was as much a trust of lands in the principal case that it should be sold, and the money paid, as it is where moneys are appointed to be paid out of the profits of the lands.

The Lord Keeper. This is not like the case where a father makes provision for younger children; for a parent is

Edwards against Groves Hob
265.

Whether the heir shall be forced to sell land devised to be sold after the death of the executor, when no party is named to sell.

A difference between a devise of money out of profits of lands, and of money raised by sale of lands.

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Vent. Rep.
340.

bound to provide for them ; nor is it like to the case of a sale to pay legacies at large , but here they are sums in gross ; and conceived a difference may be taken between the principal case and moneys appointed to be raised out of the profits of lands, that doth not amount to a total disherison, but only a charge upon the land in the heirs hand, and so that favours more of a trust than in the principal case ; and so decreed the bill to stand dismissed ; but with directions, that this should be no precedent.

The LORD KEEPER.

Justice TWISDEN.

Justice WYLD.

Pheasant and others, Executors of Walter Pheasant, against Ann Pheasant, the relict of Walter Pheasant, the Mayor and Commonalty of London, and the Chamberlain. July 4.

Walter Pheasant having taken to wife the defendant, Ann, who was an orphan, and had her portion in the Chamber of London, after his marriage took out 40*l.* thereof, and by will gives his said wife her portion in the Chamber of London, being 2800*l.* and other things to the value of 1000*l.* on condition she renounce her dower. She accepts this legacy before and after her husband's death. The bill was to perform the will, and to renounce and release her dower. She hath a cross bill for her portion in the Chamber of London, against the executors of her husband, the Mayor and Commonalty and Chamberlain, and insists that her portion belongs to her in regard the security was unaltered by her husband in his life time, and so was as much as if it were a debt due to her by bond, and sought to recover her dower besides.

For the executors it was insisted, that the moneys in the Chamber of London is not there as a common debt, but vests in the husband by marriage, it being only deposited to remain there till the orphan comes of age, which she attained during the coverture. And it was also insisted, that the receiving of 40*l.* out of it is an alteration of the property, and owning of the husband's right to the whole ; and that however she was concluded by the acceptance of her legacy in lieu of her dower. And it was said that the Mayor and Chamberlain have only the custody of the child, but not the property of her money, but that is *in custodia legis* until she comes of age, and is only *depositum* and not *debitum* in the mean time ; and it would be inconvenient if the property of the portion did not vest in the husband by marriage, for by the marriage the woman becomes dowable.

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The Lord Keeper conceived the money in the Chamber of London is a debt, for the Chamber pays interest for it, and if so, her acceptance of the matters devised to her will not bar her dower, according to Vernon's case, 4 Rep. The acceptance of a collateral satisfaction is no bar in a writ of dower : and so conceived Ann Pheasant is entitled to the money in the Chamber of London, but said he would consider of it.

And 30th October, 1670, for the executors of the husband it was insisted, that the Mayor and Commonalty have but the custody of the body and goods of the orphan, New Entries 346. And so the property is in the orphan ; and the orphan hath in truth a legal possession, the Chamberlain being in the nature of a servant to the orphan ; and possession of the servant is possession of the master, 1 Cro. Jac. 37. So that by the marriage this money is the husband's. As if an infant *feme* bring money into this court, and marries, and dies, the property is in the infant, and by marriage becomes the husband's. But it was answered, that was not like the principal case ; for here the Chamberlain pays interest, &c. but no interest is payable for money in court ; and the property here is in the infant. And so all agreed the moneys belong to the widow, and not to the executors.

DE TERM. SANCT. MICH.

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Anno Regis 22 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

Tall against Ryland. October 13.

On a Demurrer.

The plaintiff and defendant were fishmongers, and had contiguous shops ; and differences having been between them, they were made friends, and by that mediation the plaintiff was to give, and did give the defendant a bond of 20*l*. penalty, conditioned to behave himself civilly and like a good neighbour to the defendant, and not to disparage his goods. The plaintiff afterwards asked the defendant's customer, whilst cheapening a parcel of flounders, why he would buy of the defendant, and told him those fish stunk, and so the defendant lost that customer ; and the defendant having sued the bond and assigned that for breach, had a verdict. And to be

relieved against that verdict and the penalty of the bond was the prayer of the bill, which alleged that the damage was not considerable nor valuable, and therefore the plaintiff ought to be relieved against the verdict for the penalty.

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No relief in equity ag^t a bond not to disparage another man's goods.

The defendant demurred, for that the bond was not conditioned for payment of money or performance of covenants, or for any matter for which damages in an action of debt, covenant, or any other action was recoverable, nor was there any way to measure the damages but by the penalty.

1 Sid. 442.

And the bond being to preserve amity and neighbourly friendship, for the breach of which the plaintiff did submit to pay that penalty, and there can be no trial had to measure the damages for breach of the condition, other than the parties have submitted to.

No relief in equity again^t a penal bond, where there is no measure to ascertain the damages for the breach.

His lordship declared, that as this case was, the penalty being but 20*l*. he did not think fit to put the defendant to answer, for that the costs of suit here and at law would exceed the penalty, and so the demurrer was allowed. But his lordship declared this was not to be a precedent in the case of a bond of 100*l*. or the like; and though the demurrer was allowed, the defendant was to have no costs.

THE LORD KEEPER.

Palmer against Whettenhal. October 13.

Upon a demurrer.

The bill was, that the plaintiff's brother was seised in fee of a rent of 7*l*. per annum, and had the same paid him by the owner of the lands out of which this rent issued during his life, and that by his death this rent descended on the plaintiff as heir, and that the owners of the land did pay the rent to the plaintiff till 1641. And there had been several conveyances made of the land in the late troubles, and so no rent paid since 1641, and that the lands were now come to the defendant, and so the bill prayed that he might be decreed to pay the rent and arrears.

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The person is not to be subjected in equity to a rent.

The defendant said he did not know any such rent was issuing out of the said lands, and that he and those under whom he claims, had enjoyed those lands thirty several years under divers purchases, without any demand of the rent that he knew of, till the bill, and demurred. For that the bill sought to subject his person (which was not to be liable at law) to pay the rent and arrears, and for that it having been so long unpaid, it was to be presumed the rent was extinguished. And however it appearing by the bill, that the plaintiff had seisin, he might bring his assize at law; and if that had not

been a seisin, it was said that all the relief this court would have given, would be but to give seisin. And on debate the demurrer was allowed.

The LORD KEEPER.
The MASTER of the ROLLS.
Justice RAINSFORD.
Justice WINDHAM.

No relief in equity for a rent of which the plaintiff hath seisin. Moor 805. Pl. 1092. Latch. 146. 4 Leon. 184. Ant. 79. 147.

Hide against Petit. October 25.

The parties in court signed an order by consent to refer their matters to arbitrators finally to determine, and their award to be final, and stand ratified by decree without any appeal. One of the parties after that he had attended the reference, and found they inclined to order him to pay the other party a sum of money, countermands the submission.

And the first question was, whether this submission was revokable?

Of which the Lord Keeper at first seemed to doubt; but argument and producing a precedent in point, Norton against Rowland, 8 July 1664, and 10th of the same July, the judges were both of opinion, that there could be no submission to an award in law or equity, but what was revocable, and that nothing under a legislative power can make such a submission irrevocable, which in its nature is revocable. But it was an abuse to the court, as it was conceived, to revoke it, for which the court might justly lay the party by the heels. And so in this cause an attachment was awarded against him *nisi causa*. In this case it was observed, that whereas formerly the course was upon submission to award an attachment against the party failing, yet of late the courts of law do refuse to grant attachments in such cases, but leaves the party to his action, the rule being evidence of his submission.

A submission to an award by consent of parties by order of this court is revocable.

Attachment against a party revoking a submission to an award by order by consent.

In the principal case the arbitrators had determined some matters, and had left others undetermined, and submitted those other matters to the court: and whether this was therefore such an award (being but part of the matters referred) as was fit for the court to decree, was the question. And though at law an award may be good, though but for part of the matters referred, unless the submission be conditional to make an award on the premises; yet equity, as it was insisted, ought not to decree such an award, unless it be of all matters referred. And so were both the judges of that opinion; for it is not a determination pursuant to the reference, and so the award was set aside.

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Equity will not decree an award unless it be of all matters referred.

The LORD KEEPER.
Justice WINDHAM.

Squib and Bradshaw against Bolton. October 25.

Whether exceptions are to be admitted to an award on a reference by consent.

The question was, if upon a submission by order of court by consent to arbitrators, and the award to be final and stand decreed, any exceptions lie to such an award as to a report. And whether, if it were an unjust award, the court ought to decree it; and whether the court should examine the justice of the award, and the merits of it, which the Master of the Rolls had taken upon him to do in this cause, by ordering the arbitrators to certify the court whether they had considered of certain particulars, which the party disliking the award, said, they had not, which were in issue in the cause. And upon an appeal from the Master of the Rolls order, it was now ordered that the parties should attend the Master of the Rolls, and satisfy him in what he doubted. So here the court examined the justice of the award which in this cause, and the next precedent, the court did think upon circumstances, might be done, and that if an unjust award was desired to be confirmed by decree, and the court informed of it, the court ought not to decree it.

The LORD KEEPER.

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Bush against Rishley. October 31.

The bill was to have a rate tythe settled by decree against the impropiator, and prevent multiplicity of suits.

And for the plaintiffs it was prayed, that the court would either decree that the plaintiffs should hold their lands under that *modus decimandi*, which at a trial at law pending this suit was found by verdict, or that the court would direct another trial to try the verity of the *modus*, and reserve the cause till after the second trial (if the court were not satisfied with one verdict.) It being insisted, that after such tythe rate had been ascertained by two verdicts, the court ought to decree an enjoyment of the lands, for which the *modus* was payable under that rate tythe, and discharge the tythe in kind; and it was compared to the case of copyholders, that have their fines and services ascertained by the aid of this court, by directing of trials for that purpose first, and after decreeing according to the verdicts on such trials.

But for the defendant it was insisted, that this court had not at any time decreed a *modus decimandi*, and that tythes were payable in kind by common right.

And though it was insisted for the plaintiffs that it was frequent in the exchequer to decree a rate-tythe, the Lord Keeper did not think fit to decree in such a case, but ordered two depositions to be made use of at law, as occasion served. And dismissed the bill.

A rate-tythe is not to be decreed in Chancery.

The LORD KEEPER.
Justice WYLD.

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Bagg against Foster.

On a Demurrer.

William Bushel on his marriage with Dorcas his wife, enters into a bond of 1000*l.* to trustees to her use, in August, 1648, conditioned to be void, if he did not within two months settle the land in question on those trustees, to the use of himself and Dorcas, and their heirs in November next. After William Bushel covenanted with one of the trustees to stand seized of those lands to the use of himself for life, remainder to Dorcas for life, remainder to his first and tenth son in tail, remainder to his own right heirs. William Bushel dies without issue; Dorcas survives many years, and marries with one Bagg, by whom she hath issue the plaintiff, her son and heir, an infant. And now in his behalf the bill is brought against the defendant, who claims under the heir of William Bushel, to enforce a conveyance according to the condition of the bond.

For the defendant it was demurred unto, for that the bond was in 1648, and William Bushel in November after made a settlement, *ut supra*, to which one of the trustees was a party. And for that there is no issue of the plaintiff's mother, and William Bushel, and the plaintiff, a mere stranger to William Bushel, being the child of Dorcas by another husband, and that the conveyance, *ut supra*, ought reasonably to be intended for a performance of the marriage agreement, and at least that the plaintiff ought not to have any relief in equity, it not appearing that any possession hath gone according to the bond, or that any relief was till now sought, though it be one and twenty years since.

On the argument of the demurrer it was for the defendant insisted, that there being no agreement but what was in the condition of the bond, and no articles or agreement besides, and the bond two and twenty years old, and such settlement, *ut supra*, made unto one of the obligees of the same land mentioned in the condition, though not to the same uses, and Dorcas never questioning it in her life, and the agreement being secured by penalty, which was relied upon, that this

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An agreement contained in the con

dition of a bond shall not be turned into a collateral execution by decree of the land. case did differ much from an agreement by articles to settle lands, for here the party rested on a penalty, and there was no reason to turn such an agreement, as this was, into a collateral execution by decreeing the land, which the court did conceive reasonable, and so allowed the demurrer.

The LORD KEEPER.

Withers against Kelsea. November 16.

A factor gives his daughter 300*l.* portion charged on lands, and dies; the daughter marries, and hath a jointure settled on her by her husband, and hath no other portion but the 300*l.* The husband dies before any part of the 300*l.* was paid. The plaintiff is the executor of the husband, and sues the widow and the heir of the lands for the 300*l.*

The question was, who should have the 300*l.* whether the executor of the husband or the wife?

Where the portion in money shall go to the executors of the husband, and not the wife surviving.

For the executor of the husband it was insisted, that he having settled a jointure in consideration of the portion, which jointure the wife enjoyed, that thereby in equity the right of the portion was so vested in him, that the executor, and not the wife, ought to enjoy it.

The Lord Keeper declared, that this 300*l.* being to go out of the rent of the lands, and charged upon lands, was not in the nature of a thing in action, but of a rent, and given to the husband by the marriage: and so decreed for the plaintiff the executor. *Sed quære*, for a rent belonging to a feme doth, in case she survive the husband, belong to the wife, and so the arrears that incur during the coverture. 1 Inst. 351.

The LORD KEEPER.

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Justice { TWISDEN,
WYLD,
RAINSFORD,
WINDHAM.

Holt against Holt. December 7.

Alexander Holt, a citizen of London, seised and possessed of houses in London, and elsewhere of a public title, and possessed of houses in St. Martins in the Fields, by lease from the church of Westminster, 18 May, 1656, by his will in writing gave 10,000*l.* to his daughters, being his only children, and orphans, to be paid out of his estate real and personal at their age of one and twenty, or marriages, (which first shall happen) and made Alexander Holt his nephew,

and others his executors, and died. The executors proved the will; and the executor Alexander and others, as his sureties, in 1658, entered into a recognisance to the Chamberlain of London, for the payment of the 10,000*l*. (which by the will was first to be paid) before any others should have any benefit of his lands, &c.

By the restoration of the king the lands of the public title reverted to the right owners. And by the fire in London the houses of the testator in London were burnt down, so that it was to be doubted his whole estate would not amount to the 10,000*l*.

And the first question was, whether the recognizance should in equity extend any further than only to make good to the orphans so much as the testator's estate, considering the losses aforesaid, and as it now was really worth?

And it was insisted by the counsel of the sureties of the executors, that it ought not to be binding any farther in equity. For that if the Chamber of London had taken the estate of the testator into their hands, it would have been in no better plight than now it is. And the intention of the security was but that the executor should not misemploy or waste the estate, which (as it was declared) they had not done, but were ready to account for what they had already received.

The court as to that point were all of one uniform opinion, that the recognizance should be made use of no further than to make good the value of the testator's estate over and above the losses by fire, and the king's return, and decreed the same accordingly.

Albeit it was insisted for the orphans, that the condition of the recognizance was generally for payment of the 10,000*l*. (and so it was.) And the executor Alexander had thereupon taken upon himself the absolute ownership of the estate, and managed it as his own. And that now a loss had befallen the estate, the orphans ought not to be carried back to the account of the testator's estate, for that by the recognizance the orphans' portions were now become debts. Nevertheless for the reasons before it was decreed as aforesaid.

And the next question was, whether the lease held of the church of Westminster, which had been renewed by the executor, and a fine paid, and new houses built thereupon by the executors, should be taken to be part of the testator's estate?

For the executors it was insisted, they were not executors in trust for the orphans, but were to pay them out of the estate 10,000*l*. only; and the estate was looked upon at the testator's making his will, and really was then and before the said losses of much greater value, and a benefit was intended the executor Alexander by the testator. But the court did unani-

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The condition of a recognizance qualified in equity according to the equity of the matter before the recognizance was given. A condition of a recognizance for payment of money generally, qualified in equity to the original equity.

Where a lease renewed by an executor shall be liable to a legacy of the testators.

If a trustee of a term surrender and take a further term, that shall be for the benefit of *cestuy que trust*. mously agree, that the daughters should have the benefit of the renewed lease paying the fine and other charges of improving. And so it was decreed accordingly. But this must be understood so far only as to the completing the orphans' 10,000*l*. But it was agreed by the whole court, that in case of an executorship in trust, the renewal of such a lease shall go to the benefit of *cestuy que trust*.

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DE TERM. SANCTI. HILL.

Anno Regis 22 & 23 Car. II.

IN CANCELLARIA.

Judge MORETON.

Verhorn against Brewine and others. Jan. 16.

The plaintiff sued as administrator to have a discovery and an account of the estate of his intestate.

The defendant pleaded that the supposed intestate made a nuncupative will, and another person, whom he named in his plea, his executor; and insisted he was not answerable or accountable to the plaintiff, nor to any other but the executor.

A nuncupative will is not pleadable in any court before probate. On debate it was ruled, that before probate of the nuncupative will (which is only to be proved in the ecclesiastical court) it is not pleadable in any court against an administrator; and so the plea was over-ruled.

William Barber against William Took and Charles Lindsey. January 25.

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Mathew Lindsey was seized in fee of the lands in question, and by will in writing deviseth them to the plaintiff in fee, and after morgageth those lands to the defendant took for years, and dies, the defendant Charles Lindsey being his cousin and heir.

A conveyance for years is not a revocation of a devise in fee, but *pro tanto* only. And the question was, who should have the redemption, the plaintiff Barber or the heir? For the plaintiff it was insisted, that the devise to him, being of the fee, and the mortgage after being but a term for years, that was a revocation but *pro tanto*, and not *pro toto*, and the devise did notwithstanding pass the reversion, and consequently the equity of redemption.

And of that opinion was the judge. But the defendant, the heir's counsel, insisted, that there was an actual revocation of

the whole will. It was directed to be tried whether there was an actual and total revocation.

The LORD KEEPER.

The Poor of the parish of St. Dunstan, by English Bill, against Beauchamp. February 6.

A decree having been made by commissioners upon the statute of charitable uses, those for whom the decree was made brought an original bill, setting forth that the defendant to the decree threatened, when the witnesses were dead, they would except to the decree, and so prayed that the defendant might show cause, why the decree should not be confirmed. The defendant by answer submitting to the decree, it was decreed by the Lord Keeper, that the decree of the commissioners should be confirmed.

A decree by commissioners for charitable uses, confirmed by original bill.

Quod nota, and quare, what need of such a bill; for that when a decree is made by commissioners, the course is to return it into the petty-bag, and then to serve the defendant with a writ of execution, upon which service the defendant may file exceptions, and pray to stay proceedings till they be heard. But if the defendants do not then except, but submit to the decree, it seems reasonable they should be concluded thereby, and not be admitted to exceptions after.

The course of proceedings in petty-bag on decrees of charitable uses.

(194)

The MASTER of the ROLLS.

Dakins and his wife against Berisford. February 6.

Leases were devised to the defendant by his eldest brother, to be sold for several purposes, and amongst others, in trust that the defendant should purchase in his own name an annuity of 80*l.* per annum, for the life of the plaintiff's wife, and pay the same to her and her assigns. The bill was to enforce the payment of this annuity.

The defendant insisted by answer, that he had constantly paid the annuity to the plaintiff's wife (from whom the plaintiff lived apart) and that the bill was against her consent, and that it was the intent of the donor to be for her only benefit, the will being, that he should buy in his own name the annuity in trust for the plaintiff's wife (who is the defendant's mother) and her assigns, and so insisted, that the plaintiff not co-habiting with her, he ought not to be put to pay the annuity to him. It appeared by proofs that the cause of the plaintiff's first absenting himself from his wife was for fear of debts, and that he had since solicited her by letters to co-habit, but she refused.

The Master of the Rolls declared, that in this case the husband was the assignee of the wife, and that there being no

A trust for the benefit of

the wife with- negative words by the will to exclude the husband from the
out negative annuity, he could not exclude him ; and so decreed the descen-
words doth dant to pay all the arrears of the annuity since the bill exhibi-
not exclude ted, and the growing annuity for the future to the plaintiff the
the husband. husband.

(159)

The LORD KEEPER.
Justice TWISDEN.
Justice MORETON.

Smith and others against Stowel and others. February 17.

There was a disposition in 1579, (which was before the statute of 43 Eliz. for charitable uses) to a charity ; part of the lands were of a defective title, and the whole disposition void, being before the statute. Yet an agreement was made between the parties interested and the trustee, for the settling the use designed, so much as was proportionable in value to what the donor had to give, and this was settled accordingly before the statute, and long leases were let of the ground to divers tenants, at small rents, to build, who had thereby improved that ground that was but 20*l.* per annum, to 150*l.* per annum.

An appoint-
ment to a
charity that
was preced-
ent to the
statute of 43
Eliz and so
void, is made
good by the
statute.
Ter-tenants
lessees of a
charity or-
dered to aug-
ment their
rent.

A decree was made by the commissioners for avoiding the tenants' leases, they not being in strictness of law good.

Upon exceptions to that decree, it was declared by the court, that though the charity was precedent to the statute, yet the statute subsequent has a retrospect, and would make it a good appointment, that was not so before (but void.) And it was declared, that so as the ter-tenants be no losers they ought not to be gainers in the case of charity : and so ordered, that during the ter-tenants' leases there should be an augmentation of 50*l.* per annum allowed by them in propor-
tion to the poor.

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The LORD KEEPER.

Justice { TWISDEN,
WYLD,
RAINSFORD.
WINDHAM.

*Henry North, Esquire, against Charles Crompton, Esquire.
March 25.*

Katharine Crompton, spinster, seized in fee of the lands in question, by her will in writing the 21st of January, 1669, expresseth thus : I ordain and constitute *Henry North Esq.* (which is the plaintiff) to be mine executor of this my last

will. And I do give all my estate, real and personal, to dispose of for the payment of all my just debts ; and for the performing of all such legacies as I have herein, or by the codicil annexed, bequeathed unto my executor above named ; and gives several legacies in money, and amongst others 200*l.* to the defendant her uncle, who is heir at law ; and a legacy of 500*l.* being omitted to the plaintiff's sister, it was inserted in a codicil.

Mr. North's bill was to prove this will, *per testes*.

Mr. Crompton's bill was to be relieved upon the trust of the devise as he supposed after the debts and legacies paid, and to discover what the debts were.

These causes came first to be heard 8th February, 1670, before the Lord Keeper and Baron Wyndham, and then these two questions were stirred by the court.

1. Whether this were a devise of lands in fee ?

2. Whether Mr. North (the plaintiff Crompton claiming by an implied trust) after debts and legacies paid, might not be admitted to aver against that implication ?

Of both these points the court took time to consider.

March 3, 1670, the cause being heard again before the Lord Keeper and Mr. Baron Wyndham, they declared they were both of opinion, that it was a devise of the lands in fee, and then they doubted whether a trust be created, for the heir, of the surplus. And another question they made, if a trust, whether an averment did not lie for Mr. North, it being but an implied trust, and not [within the statute of H. VIII. of wills. (197)]

And 25th March, 1671, the Lord Keeper and the four judges all agreed, that a fee passeth by the devise. And as to the implied trust all conceived there was not any implied trust for the heir for the surplus ; for if there were, the devisee had no benefit ; and to no purpose was the devisee of the 200*l.* to the heir, if she had intended the surplus to the heir.

DE TERM. PASCHÆ.

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Anno Regis 23 Car. II.

IN CANCELLARIA.

The LORD KEEPER.

Thomas Martin, Clerk, against *Dough and Overton*.

One Foster deviseth to the plaintiff in these words, *Item*, I give to my cousin *Thomas Martin*, Clerk, late minister of

*Houghton in Northamptonshire, and living thereabouts, I do order 40*l.* to be paid him, to be disposed of for certain uses, which I shall in a private note acquaint him with, and gave him no note or direction how to dispose of it, but died, the defendants being his executors. And whether the plaintiff should have the 40*l.* was the question.*

*The Master of the Rolls was of opinion the plaintiff should have the 40*l.* for that the testator did not intend it should come to his executors, but had by his will given it away from them; and so he decreed the defendant to pay the 40*l.* to the plaintiff.*

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The LORD KEEPER.

Pate against Hatton, or Hutton. May 15.

A citizen and freeman of London deviseth to his son a gross sum, which did exceed the customary part, and deviseth that if his son die before he attain one and twenty, that sum over to another.

The question was, if the devise over was good?

And it was adjudged, and so decreed by the Lord Keeper, that the devise over for so much as was the customary part, was void, and that the orphan dying within age, his administrator was entitled to so much as was the customary part, and the surplus of that gross sum to go to those to whom it was devised over.

The LORD KEEPER.

Lambert against Bainton. May 15.

Mr. Dunch, in 1646, had conveyed the lands in question to Sir Edward Bainton in fee, in trust to sell all, or any part of it for payment of his debts. Sir Edward Bainton had conveyed his lands to his son, and was dead. Dunch being dead, and the plaintiff being entitled to the benefit of the trust after the debts paid, brought the bill to avoid the conveyance made by Sir Edward Bainton to his son, and so have a reconveyance.

Where a trustee for sale of lands for payment of debts pays to the value of the lands, thereby he becomes a purchaser himself.

For the defendant it was insisted, that though it was a trust in Sir Edward, yet Sir Edward had paid the debts to the value of the estate, and was thereby become a purchaser as much as if he had sold the lands to another.

The Lord Keeper declared, that if Sir Edward Bainton had paid to the value of the lands, he was a purchaser; but it not appearing what he had paid when he made the settlement more than he received, referred it to a master to exa-

mine, and declared, that the defendant, as to so much as Sir Edward had then disbursed, should be taken as purchaser, because Sir Edward might sell all or any part; and so the defendant is a purchaser *pro tanto*.

The LORD KEEPER.

William Vanbrough against *William Cock* and *his wife*, and *Peter Drybutter*. May 17.

About seventeen years since, Cornelius Beard bequeaths to his sister, then in her infancy, 250*l*. to be paid at marriage, or one and twenty years, and made one Andrew Drybutter and the plaintiff executors, and died, leaving his sister young. Both the executors made probate of the will, but the plaintiff at the desire of the sister's friends did forbear to meddle with the testator's estate, and left it wholly to Andrew Drybutter, the other executor, who only did act in it. Andrew dying he made Elizabeth, his wife, his executrix. She possessed what there was of the first testator's estate, and paid to the defendant Cock's wife, then the wife of one Earl, 100*l*. part of the 250*l*. and the said Elizabeth Drybutter kept all the first testator's books and papers, and that by the desire of the said legatee, and she dying she made the defendant Peter Drybutter her executor. The defendant, Cock's wife, libelled in the spiritual court against the plaintiff for her 250*l*. and hath sentence there against him for the whole, hanging this suit, and yet hath by answer confessed 100*l*. part of the 250*l*. to be paid.

The scope of the bill was to be relieved against the spiritual court, setting forth that by that law the plaintiff having joined in the probate would be charged with the legacy, though he did not meddle with the estate; and that it was against equity to charge one executor with the receipts of another. And the bill charged that the other defendant Drybutter had assets both of Andrew Drybutter and Elizabeth Drybutter's estate, and if they had not paid as far as they had assets of Beard's estate, the defendant Drybutter, and not the plaintiff, ought to pay what was unpaid of the 250*l*. legacy.

The defendant Drybutter confessed he had assets of the said Andrew and Elizabeth, his father and mother's respective estates, and insisted that they had fully administered Beard's estate, and the question was what relief they ought to give the plaintiff against the sentence of the spiritual court.

The Lord Keeper declared, that the judgments of the ecclesiastical court were as subject to the equity of this court, (201) whether a sentence in a

spiritual
court be sub-
ject to exami-
nation in
equity.

as judgments in the common law courts; and howbeit at law one executor is not liable to the *devastavit* of another, yet in the ecclesiastical courts, and by their law, if an executor prove the will, they will charge him, though he do no further intermeddle to pay the legacies. But *quære* if that be not only where there is a failure of bringing an inventory. Doctor & Stud. 67. And the Lord Keeper declared the plaintiff is without relief by appeal from the sentence, because the judges delegate must judge according to that law, and so inclined to relieve the plaintiff, but took time to advise.

Presumption.

Doctor & Student, *ut supra*, a law grounded on a presumption, if the presumption be untrue, is not to be holden in conscience; for *stabitur præsumptio donec probetur in contrarium*.

Mortgage.
Antea.

2 Vent. 337,
338. Hard-
ress, 173.

2 Chanc. ca-
ses, 208. 20.
35. 213. 1

Chanc. cases,
36. 162. 163.

A puisne
mortgagee
buying in a
precedent in-
cumbrance,
shall hold a
gainst a mid-
dle mortga-
gee, till both
are satisfied.

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Where a
mortgagee
buying in a
precedent se-
curity of the
lands in his
mortgage and
other lands,
shall hold all
against a mid-
dle mortga-
gee of all
those lands,
till all due to
him on both
securities be
satisfied.

Sir Ralph Bovey against Skipwith. May 25.

In 1651, Sir Francis Drake made the plaintiff a security out of the manor and rectory of Wakhham upon Thames. Afterwards in 1656, Drake made the defendant a security for money out of the rectory only (the defendant having no notice then of the plaintiff's security which was for money also.) Afterwards the defendant hearing of the plaintiff's security, buys in a security precedent to the plaintiff's, which one Beddingfield had bought upon the manor and rectory.

1. Question was, whether the plaintiff should be admitted to redeem Beddingfield's security without paying off what was due to Skipwith? And it was ruled he should not. Vide Marsh and Lee's case.

2. Question was, whether inasmuch as the defendant's security was only out of the rectory, and the security he bought in from Beddingfield was of both the manor and rectory, the defendant should make use of Beddingfield's security as to the manor, after that by the profits of the manor and rectory Beddingfield's debt was satisfied? And whether then the plaintiff should not then be admitted to enjoy the manor, his security being as well of the manor as the rectory, and the defendant to hold only the rectory till he was satisfied.

Wyld and Twisden were of opinion, that after Skipwith had received what was due on Beddingfield's security, he should receive no more profits of the manor, but the plaintiff to be let in to receive them, and the defendant only to make use of Beddingfield's security as to the rectory to protect his security of the rectory. But it was resolved and ruled, that the defendant should hold both the manor and rectory against the plaintiff till all due him on both the securities was paid him. *Quære tamen.*

The LORD KEEPER.

Rich against Sydenham. May 26.

The plaintiff upon the loan of 90*l.* had gotten a bond from the defendant of 1600*l.* for payment of 800*l.* and judgment thereupon. The defendant in the right of his wife was entitled to certain lands that were estated in other persons in law in trust for her.

The bill was to have those lands subjected to the plaintiff's satisfaction here, inasmuch as the defendant was entitled to the trust in the right of his wife.

But the security being gotten from the defendant when he was drunk, the Lord Keeper would not give the plaintiff any relief in equity, not so much as for the principal he had really lent; and so the bill was dismissed.

Where the contract is in-tire, and in-equitable e-quity will not apportion re-lief for part.

The LORD KEEPER.

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The Mayor and Aldermen of London, and Byfield an Infant, against Slaughter, the Executors of the Plaintiff's Father. May 27.

The bill was to bring in one that lived out of the jurisdiction of London, to come and give security to the city for the orphan's portion, according to the custom of the city.

The defendant by his answer offers to do as this court should direct, but being no freeman, would not be subject to the city orders.

The Recorder. This court useth to assist the city in such like cases, and on petition useth to grant subpœna's to persons to appear before the mayor in his court, and cited a precedent 28th February, 3 Jac. Fish and Cole's case, of a subpœna out of the subpœna office.

Maynard for the defendant. This custom concerns the country as well as the city, and must be tried by verdict; and it is inconvenient for country gentlemen to be put to give security to the orphans' court by recognizance.

The Lord Keeper decreed the plaintiffs to try the custom.

1 Rol. Abr. 373. M. Pl. 3

The chance-ry assistant to the jurisdiction of mayor's court.

DE TERM. SANC. TRIN.

Anno Regis 23 Car II.

IN CANCELLARIA.

The LORD KEEPER.

Doctor Salmon against the Hamborough Company by the name of the Governor, Assistants and Fellowship of Merchant Adventurers of England, and divers particular members of that company by name, in their natural capacities.

A course to recover a debt from a corporation that hath nothing whereby it may be summoned.

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The bill charged, that the company were incorporated *prout per* letters patent, and had power to make by-laws, and to assess rates upon cloths (which was the commodity they dealt in) and by poll upon every member to defray the necessary charge of the company, and that the company had imposed rates accordingly, as namely, 4s. 6d. upon every white cloth exported, and divers others, and thereby raised 8,000*l.* per annum towards the support of the common charge of the company, and that they had thereby got great credit, and borrowed great sums of money by their common seal, and particularly the plaintiff lent 2,000*l.* upon that security many years since. And the bill did set forth divers advantages they had in trade by being members of this corporation, which others wanted. And the bill did charge, that the company having no common stock, the plaintiff had no remedy at law for his debt, but did charge that their usage had been to make taxes, and levy actions upon the members and their goods, to bear the charge of their company to pay their debts, and did complain that they now did refuse to execute that power, and did particularly complain against divers of the members by name, that they did refuse to meet and lay taxes, and that they did pretend want of power by their charter to lay such taxes, whereas they had formerly exercised power, and thereby gained credit; whereupon the plaintiff lent them 2,000*l.* which was for the use and support of the company's charge, and so ought to be made good by them, and so prayed to be relieved.

Paschæ 1656, this bill was filed, and the company served with process, but would not appear, they having nothing by which they may be distrained: but divers particular members being served in their natural capacities, did appear and demur, for that they were not in that capacity liable to the plaintiff's demands. May 10, 1656, on the argument the demurrer

was allowed, and the bill dismissed as to them, and that dismissal enrolled, and thereupon a petition of appeal was preferred to the lords in parliament, admitting that in the ordinary course of proceedings in chancery, that court could not help the plaintiff. But in causes of this nature the lords' house had given special directions to the Chancery to relieve, and it had been accordingly so done, and produced two precedents against companies in London for that purpose. And to this petition the defendants particularly named did put in an answer, plea and demurrer, and the company, though several times summoned, did not appear. And upon debate of the matters before the lords at the bar of the lords' house 20 January, 1670, this order was made.

Where the chancery (according to rule cannot relieve in a just cause, the parliament will give special direction for relief.

The matter upon the petition of Salmon, Dr. of physic, exhibited to the lords spiritual and temporal in parliament assembled, against the governors, assistants and fellowship of the merchant adventurers of England, commonly called the Hamburg Company, and Sir Charles Lloyd Baronet, Sir Anthony Bateman, Knight, Thomas Smith Richard Wyan, John Dogget, Henry Colliar, Henry Smith, John Lethieulier, Christopher Pack, George Wytham, and others, members of the said company, and upon the answer, plea and demurrer of the said Rowland Wyan, John Dogget, Henry Collier and John Lethieulier put in to the said petition (the governor, assistants and fellowships, though several times summoned, not appearing) being heard at the bar of this house, in presence of counsel learned on both sides, the said petition being on appeal made from a dismissal in the high court of chancery, and the petitioners' bill there. Their lordships on reading the said petition, the answer, plea and demurrer thereto, and the said dismissal, and the charter by which the said governor and fellowship are incorporated, and hearing what was alleged on both sides, do order that the dismissal for so much as concerns the said company, be, and do stand reversed, and that the Lord Chancellor or the Lord Keeper of the great seal of England for the time being, do retain the said bill. And that the said court of Chancery shall issue forth the usual process of that court, and if cause be, process of *distringas* thereupon against the said corporation; provided the said process be served one month before the return thereof. And if upon return of the process, the said corporation shall not file an appearance, or shall appear and not answer, the said bill shall be taken *pro confesso*, and a decree shall thereupon pass. But in case the said corporation shall appear and answer within the time aforesaid, then the court of Chancery shall proceed to examine what the plaintiff's just debt is, and shall decree the said company to pay so much money

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as the same shall appear to amount unto, with reasonable damages. And in case the corporation shall not pay the sum decreed within ninety days after the service of the said decree upon their governor, deputy governor, treasurer, clerk or secretary for the time being, then the lord's spiritual and temporal do farther order, adjudge and direct, that the Lord Chancellor or Lord Keeper for the time being, shall order and decree that the governor or deputy governor and the twenty-four assistants of the said company, or so many of them as by the tenor of their charter do constitute a quorum for the making of leviations upon the trade or members of the said company for the use of the said company, shall within such time as by the Lord Chancellor or keeper shall be thought fit, make such leviation upon every member of the said company as is to be contributory to the public charge, as shall be sufficient to satisfy the said sum to be decreed to the plaintiff in that cause, and to collect and levy the same, and to pay it over to the plaintiff as the court shall direct. And such a leviation is to be put in writing, and signed with the hand of the governor, deputy governor and assistants of the aforesaid company for the time being, and so many of them as by the constitution of the said charter do make a quorum shall not make or return such leviations, as aforesaid, the Lord Chancellor or Lord Keeper may issue process of contempt against them, as is usual against persons in their natural capacities. And if by the said time so to be limited by the said court of Chancery the said money so to be assessed shall not be paid, then and from thenceforth every person of the said company upon such a leviation shall be made to be liable in his capacity to pay his *quota* or proportion assessed. And the Lord Chancellor or Lord Keeper is to order or decree, that such process shall issue against any such member so refusing or delaying to pay his *quota* or proportion as is usual against persons charged by the decree of the said court for any duty in their several capacities. And if the total so returned and filed with the register shall not amount to so much as shall be sufficient to satisfy the sum decreed, with respect had to such person as shall make it appear that they are overcharged, or ought not to be charged at all, then the said Lord Chancellor or Lord Keeper for the time being may from time to time order that a new leviation be made and returned into the registers of the court of Chancery, of such sum as shall be sufficient, by way of supplement for that purpose, to the payment whereof every individual person is to be bound in such manner as aforesaid.

6 March, 1670. The Lord Keeper on a motion grounded on the Lords, ordered that the dismissal stand reversed, and

the bill stand revived, and that process and other proceedings issue as is thereby directed, and the service thereby directed be sufficient.

Accordingly the treasurer and secretary were served with a *distringas* against the company, and copies of the Lord's order. The sheriff returned *nulla bona*; and no appearance is made.

5 July, 1671. Ordered the cause be put into the paper to be heard, and notice to be given to the treasurer, clerks and secretary. [208]

And now the 5th of July, 1671, none appearing for the defendants, the court decreed the bill to be taken *pro confesso*, *Pro confesso.* and the defendants to pay the plaintiff's debt, according to the Lord's order in parliament.

The LORD KEEPER.
Justice WYLD.
Baron WINDHAM.

The Lord Cornbury and dame Flora his wife, formerly the lady Backhouse, against Simon Middleton and others.
July, 1671.

This cause begins fol. 173, and being abated by the plaintiff's intermarriage since the last hearing, a bill of revive was brought, and the cause was reheard by the Lord Keeper, assisted with Justice Wyld and Baron Windham the third of March, 1670. And the case appearing to be as before, it was for the defendants insisted, that the contract made by Sir Hugh Middleton, with Mr. Bishop, did not bind, and that he being but *cestui que trust* of a surplus, had no power to sell, for that it was against the very essence of the trust for him to have a power to dispose; and it would be a vain thing for any parent to settle his estate by way of trust to prevent his son's imprudent disposition of it, (which Sir William Middleton did here so settle his estate with a design to keep a hand on his son,) if notwithstanding his son might have power to sell it when he pleased.

Cestui que trust of a surplus hath but a bare possibility, and cannot sell.

And it was farther insisted on for the defendant, that if the agreement with Bishop were binding, yet the plaintiffs have no title to have the benefit of that agreement, for that the breach of an agreement, as the case was, was not devisable, and so the plaintiff had no title. Things in action, as this case is, being not devisable.

The breach of an agreement is not devisable.

Equity consists purely in action and is only at

To which it was answered by the plaintiff's counsel, that equity consists purely in action, and is only to be come by, by the process of this court; and cited Cole and Moor's case, 5 Jac. Moor's Rep.

tainable by process in a court of equity.

The remedy of an agreement ought to be reciprocal.

The consent of the heir makes good a void devise.

Windham was of opinion that the benefit of this agreement is not devisable: for things that consist in privity must be carried on in privity, and Sir Hugh Middleton could not have enforced the devise, unless she had pleased to pay the money Bishop was to pay, and the remedy ought to be reciprocal.

Wyld. Sir Hugh had an equity to the residue after the debt and portions paid, and it was a crime to sell a thing twice, and the defendant was *particeps criminis*, and so no decree ought to be for him, but would have Sir Samuel Jones and the other trustees for Sir William Middleton, in whom three parts of the four were vested in point of law, convey fourteen shares to the lady Cornbury and her heirs.

Lord Keeper agrees with Wyld that the clear equity and conscience was with Bishop's title, and that the defendant Simon Middleton did interlope; but did much doubt upon the devise. Yet forasmuch as Bishop's heir was a defendant, and consents to the devise by answer, did decree, that Sir Samuel Jones and the six clerks to whom he had conveyed by order of this court, should convey by consent of the heir of Bishop, fourteen shares to the lady Cornbury and her heirs.

The Lord Keeper upon the hearing by himself alone in June, 1670, being of opinion to dismiss the bill, and the court being now divided in opinion, the defendant, Simon Middleton, petitioned for a rehearing, and had a hearing accordingly in July, 1671, before the Lord Keeper, Master of the Rolls, Rainsford, Wyld and Windham.

And now upon this rehearing, it was for the defendant Simon Middleton insisted, that the agreement with Bishop did not bind, for the reason *supra*; and farther, that the agreement itself was imperfect, because the money was to be paid as the trustees should agree, and they did never agree to it, but Henry Middleton, the only acting trustee, did so soon as he heard of it, utterly disagree to it; and also for that the agreement with Bishop was not pursued, for the agreement with Bishop was in June, 1657, and by that the conveyances were to be executed in August next, but those not so much as prepared, nor any thing done in time, and but 250*l.* paid, and the defendant Simon had paid above 15,000*l.* and had a conveyance by deed and fine of the whole thirty six shares (Bishop's contract being but for fourteen shares, executed above twelve years since,) and had been in the possession of the whole thirty-six shares ever since; and that the company of the New River had bought in another water-work, from Sir Edward Ford, which was united to that of the New River, and mixed with it, and could not be distinguished, and that no distinct account could be taken, and so it was impracticable to decree the performance of the agree

ment with Bishop, nor could Sir Hugh have compelled him to perform the same. And if the city which was lately burnt had not been rebuilt, or any other loss had befallen the water-work, the said Sir Hugh could never have compelled the lady Cornbury to pay the money; and the heir's consent, though it may bind himself, shall not put a bargain upon another.

Consent binds the party, but shall not bind an other.

But it was for the plaintiff insisted, that the money Bishop was to pay, was enough to pay all the debts and legacies of Sir William Middleton, and thereby all the trusts precedent to Sir Hugh might have been satisfied, and so Sir Hugh had a clear title to the surplus, and he was looked upon as the owner, and the contract with Bishop was in pursuance of the trust, and he might by a bill have compelled the trustees to sell. And that the reason why the agreement was not pursued in time, was because Sir Hugh Middleton's occasions drew him to the Bath, and he writ a letter to have it respedited till he came back, which was not till after August. And the defendant Simon was a wilful purchaser, with notice of the agreement, and Sir Hugh would have performed with Bishop, if Sir Hugh had not been persuaded by Simon; and Bishop did endeavour to take up money of Sir George Prat for that purpose, and that these doings of Simon were against conscience, and that in conscience the first agreement ought to be performed, and the court ought to decree with, and not against conscience.

A purchaser with notice.

Windham adheres to his first opinion, (viz.) that the bill ought to be dismissed, for he was not satisfied that Sir Hugh had any such interest as he could contract for, nor is it well come to the lady Cornbury, though Sir Hugh might by a bill enforce the trustees to sell; for what a man may do himself, is not transferrable in all cases; and what a man cannot transfer, he cannot oblige by articles. If Sir Hugh could not grant, he could not by the articles bind; his interest is but a mere possibility contingent; in its creation it is so. Sir William hath a power to charge, and doth so by his will, and Sir Hugh could not dispose in his father's life time, and what Sir Hugh should have is uncertain, for the trustees might sell so much as to perform the precedent trust. Nor was it intended by Sir William, that Sir Hugh should sell. If Sir Hugh had had the possession with this contingent interest, it might have gone far; but Sir Hugh had no possession. If Sir Hugh had covenanted the trustees should convey, equity ought not to decree him to procure them to convey, but to leave the covenantee to his covenant at law; and by the agreement the payment of the money is entangled, and doth not pursue the trust; and Mr. Bishop could not enforce his interest; nor is the devisee bound to pay the money, nor shall she take it up or lay it down as she pleases. Cases that

What a man cannot transfer he cannot oblige by articles.

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If cestui que trust covenants that his trustees shall convey, and he hath no means to force them make such conveyance, equity ought not to decree him to procure them convey, but to leave the

covenanted to his covenant. Cases that consist in privity, are to be carried on in privity. A fine of tenant in common passeth but his own estate.

Circuity of action.

Interest to be considered as it was at the time of the contract, and not at the time of its creation.

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rest in privity are to be carried on in privity, and strangers not to be engaged in it. The heir comes in as improper as the defendant, and that cannot help it.

Wyld. This is a case in equity and in conscience, and this court is to help that side that hath conscience. The case is on a trust, and that proper here, and an interest in a trust is in equity assignable or devisable. And if land be conveyed for payment of debts and legacies, and what remains to be to the heir, the heir may dispose, and the fine to Simon Middleton by Henry doth nothing. For it is but the fine for one tenant in common which passeth but his own share. Possibly a fine and non claim may bar in equity, but not here, for a bill was presently filed. Notice is all in all in the case ; and it is against good conscience for Simon Middleton to enjoy ; and the court must judge with conscience, and not against conscience. If this be an interest it is devisable ; and it is but circuity of action to bring the heir to revive ; for if he will not execute the estate to the devisee, she must bring a new bill against him. And concluded, that there ought to be a decree for the plaintiffs, but no action to be but of the 7650*l*. to be paid by the defendant, and to convey fourteen shares of the thirty-six shares, and the mesne profits to go against interest.

Rainsford conceived the plaintiff ought to be relieved, for Sir Hugh had an equitable interest that might be transferred in equity, though it was in its creation contingent ; and we are not to take our measure as it stood in the creation, but as it stood when the contract was made with Mr. Bishop, and he that may transfer may covenant, that his trustee shall do it. And Simon Middleton injuriously comes in with notice, and threatens Sir Hugh into this contract, and conceived Bishop might devise, and concluded as Wyld did.

The Master of the Rolls agreed with Rainsford and Wyld, and looked upon the agreement with Bishop to be in pursuance of the trust.

The Lord Keeper, when he first heard this cause, was of opinion to dismiss the bill ; but that was on a mistake ; for he did conceive that all the trustees had conveyed to Simon Middleton, whereas it seems that Henry Middleton (who was but one of the trustees) had conveyed to the said Simon. It is a cause of great consequence, and the trustees were trusted as well for Sir Hugh as the others, and conceived the plaintiffs ought to be relieved. Bishop hath the first agreement, and Simon Middleton the second, and equity ought to decree with the first, and the fine and conveyance carries no more from Henry than his fourth part, and carries Sir Hugh's equity no farther ; and so decreed, that out of the three parts remaining, fourteen shares of the thirty-six parts shall be conveyed by the

six clerks to the Lady Cornbury and her heirs, and no account of mesne profits, but those to go against interest. And as to Ford's water-work, if it can be severed it cannot be taken into the decree; but if it cannot, there must be an allowance for it, and so it was decreed accordingly. And whereas the said thirty-six parts were charged with a rent of 500*l.* per annum to the crown in fee, and 100*l.* per annum to Henry Middleton for life, and Sir Hugh in his agreement with Bishop had covenanted to discharge the fourteen shares he had agreed to sell Bishop from those rents. It was farther decreed, that the plaintiff should enjoy the fourteen shares discharged of those rents, and that the other twenty-two shares should be subject to the plaintiff's indemnity therein, notwithstanding it was insisted, that Sir Hugh's covenant to discharge the fourteen shares of those rents was merely personal, and did not, nor could charge the whole rents upon the twenty-two shares.

Hardr. 87.
Con.

DE TERM. SANCT. MICH.

Anno Regis 23 Car. II.

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IN CANCELLARIA.

The LORD KEEPER.

Washborn against Downes. December 5.

The question was, whether a recovery by *cestuy que trust* should bar as in a case of an estate at law.

The court held clearly, that a fine of a *cestuy que trust* will bar the estate, but not the remainder over to another; because a fine will pass or extinguish all right or title which the cognizors have in the land. But it was doubted, whether by a recovery of *cestuy que trust* any thing be barred: for that if tenant in tail at law suffer a recovery, legal exceptions may be taken to it; but if a recovery may be in equity, all those exceptions are taken away; and as to the case of Goodrich and Brown, fol. 49, it was said, that was without a precedent; and the plaintiff in that case doth not rely on his decree; but the matter was afterwards compromised. And it was a question in Bathurst's and Emason's case; and that case was agreed.

By the fine of a *cestuy que trust* in tail, the entail may be barred.

The court in the principal case took time to advise, and advised the parties to agree. And in the debate of this case, it was said that a perpetuity is, where if all that have interest, join, and yet cannot bar or pass the estate. But if by the concurrence of all having the estate tail may be barred, it is no perpetuity.

The definition of a perpetuity.

Sir Robert Atkins against George Mountague.

There was a trial at bar touching the title of the master of the hospital of St. Katherines' which the plaintiff claimed by a grant from the queen consort that now is ; and the defendant held and enjoyed by two grants, one from Henrietta Maria, the queen dowager ; another from his majesty that now is, before his marriage.

Upon the evidence divers points arose.

Monasticon
2d. part. 460.

1. The plaintiff's title was founded upon the charter of queen Eleanor, dowager of H. III. (which see in Dugdale) who added to the endowment of this hospital most part of the possessions,

Reservatis nobis & Reginis Angliæ nobis succedentibus plenam potestatem providendi magistrum, &c. Volumus etiam, quod omnes reginæ nobis succedentes jus patronatus habeant, &c. which was confirmed by the subsequent charters of E. II. and E. III.

2 Keb. 808.
Co. Lit. 8.
Princes case

2. Against the foundation of this title the defendant's counsel objected, that a limitation of the patronage *reginis succedentibus* by charter is void, for such a desultory kind of inheritance cannot be limited but by Act of Parliament, just as the dutchy of Cornwall was by Act of Parliament in 11 E. III. limited to the king's eldest son for the time being.

Difference
between an
advowson in
esse and the
patronage of
an hospital
newly created.

But Hale chief justice and whole court resolved to the contrary ; for they took a difference between an advowson in *esse*, and the patronage of an hospital newly created ; for the land or an advowson, it is true, no desultory kind of inheritance can be limited without Act of Parliament, because then he who had right could not always know against whom to bring his action : but of the patronage of an hospital newly founded there can be no precedent right, and therefore at the very first institution it may be limited as the king pleases, like the case of a rent *de novo*.

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Master of an
hospital, pre-
bendary,
donative not
grantable in
reversion.

Though the several patents were produced on each-side, wherein the master of the hospital had been granted in reversion, yet resolved by Hale, and the whole court, that all such grants were void ; for the master of that hospital, when he is seised in fee in right of the hospital, and of an estate in fee simple, there can be no reversion to grant. Therefore this case is not to be compared to the grant of an office in reversion, but is more like the case of a prebendary or a donative, which cannot be granted in reversion.

3. Then it was objected by the plaintiff, that the defendant's grant from the queen dowager was void, because there was a former grant which the queen dowager made to one Mr. H. Mountague who was alive at the time of the grant to the defendant. The defendant showed that the grant to H.

Mountague was void, because it was *habend. post mort* Sir Julius Cæsar, and so a grant in reversion, which was held a clear answer.

4. It was resolved, that in a patent which grants the mastership of an hospital, the words are not to be so precisely examined as in a patent of land or other office; for in this case it is sufficient, if there be words of nomination only, because the patentee is not in by the patent alone, but by the original constitution upon the foundation. Diversity between the grant of the mastership of an hospital and a patent for land.

5. It was said by Hale, that though here the question be touching the interest of a queen dowager in the patronage when there is no queen consort, yet it seemed to him that if there be a queen dowager and queen consort both at the time of the voidance of the hospital, the queen dowager shall present.

6. If the dowager's grant be good, when there is a queen consort, it is much more so when there is none; and if there could yet remain a scruple, the king's grant and confirmation clears it; for if there be no consort nor dowager, doubtless the king's presentation is good: and this alone is sufficient to support the defendant's title.

The plaintiff replied, that the king's presentation in such case was good only by way of a provisional supply until a consort come, and then was to cease.

Which all the court denied; for the master by his incumbency gains a fee-simple, which cannot be determined by the determination of the plaintiff's interest; as in the case of the Dutchess of Cornwall: if the king let the land, the lease is void when the prince is born. But if he present to an ad-dowson, the clerk continues.

Wherefore the plaintiff seeing the opinion of the court against him, became nonsuited.

DE TERM. SANCT. HILL.

Anno Regis 23 Car. II.

IN CANCELLARIA.

The LORD KEEPER.
Justice TWISDEN.

Hosanna Holford against Holford. February 9.

This cause having been formerly heard, and the plaintiff claiming under articles of marriage between her father and mother, whereby in consideration of a great portion, her fa-

ther did agree to settle the lands in question on himself and his wife and their issue (whose issue the plaintiff is) but though he lived some years after, did not execute any conveyance, And the defendant being the plaintiff's father's brother, claimed by a deed of intail made by the plaintiff's father ten years before the articles (whereby for failure of issue male on his own body, the lands were limited to the defendant) it was directed to a trial on this issue, whether the deed by which the defendant claimed was fraudulent or not, and the defendant to admit the plaintiff a purchaser, that the fraud might come in issue. A trial was had, and it was found against the plaintiff.

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A conveyance cannot be fraudulent against articles without another conveyance be executed in a legal course

And now for the plaintiff it was prayed there might be a new trial, and that the defendant might at such trial admit the plaintiff had a conveyance: for as it stood upon articles the defendants conveyance could not be taken to be fraudulent against the articles, nothing passing in law thereby, and yet it would be fraudulent against a conveyance.

Trial of fraudulent conveyance

And therefore it was insisted, the defendant ought to admit the plaintiff had a conveyance, though not such a one as to bar the estate tail, yet a conveyance by way of lease and release; as if the plaintiff's father was seised in fee, and then the matter of the fraud would properly come in issue, which the court denied, and so dismissed the bill. And in the arguing of this cause it was admitted, that every voluntary conveyance is *prima facie* fraudulent against a conveyance for consideration.

The LORD KEEPER.
Chief Justice HALES.
Justice WYLD.
Justice WINDHAM.

Chaumond Roscarrick, Esquire, against Barton. Feb. 21.

May 12. 10 *Jacobi*, Charles Roscarrick, on his marriage with Dorothy his wife, settles the lands in question (*inter alia*) on himself for life, remainder to Dorothy for life, remainder to the heirs male of his own body; he hath issue Charles his first, and the plaintiff his second son, and dies; Dorothy marries with one Greenvil, and they enter on the lands in question as the jointure of Dorothy.

Charles, the son, 15th November, 13 Car. 1. by deed, fine and recovery for 800*l.* conveys the lands in question to Greenvil and his wife, to the use of Dorothy for life, remainder to the use of Charles and his heirs, till he fail to pay several

sums at several days, amounting to 800*l*. and after default of payment of any sum to Greenvil and his heirs.

Afterwards 14 Car. I. Charles on his own marriage settles the lands in question, *inter alia*, to himself for life, remainder to Margaret his wife for life, remainder to his first and other sons in tail, remainder to the plaintiff in tail. In 1650, Greenvil assigns his estate which was for the security of the 800*l*. and was forfeited to the defendant by the consent of Charles. In 1656, upon a bill exhibited by the defendant in Chancery against Charles, it is decreed Charles shall pay the defendant what is due to him (*viz.*) 1250*l*. or the now defendant, plaintiff in that cause, to hold against Charles and all claiming under him. Charles dies without issue male, Dorothy lives till 1668, then the now plaintiff exhibits his bill to redeem, and alleges that the decree against Charles was by consent, and that it was agreed between Charles and the defendant, that notwithstanding the decree, it should be still a mortgage in the defendant's hands and be redeemable upon payment of principal and interest, and however that the plaintiff being no party to that decree, and Charles but tenant for life, that decree could not bind the plaintiff. And as to the pretence of an agreement between Charles and the defendant, that notwithstanding the decree the estate should remain still a mortgage in the defendant's hands, there was no proof of any such agreement or consent, but only told Charles he would come to an account; but there being dealings and accounts between the defendant and Charles, it was declared by the Lord Keeper (who first heard this cause in July 1671,) that general words not particularly applied ought not to shake a decree; for if they did, there would be no end of suits. [218]

But then it was insisted for the plaintiff, that he being no party to the decree was not bound thereby, and that he had an equity to redeem, and that the mortgage was not to be taken to be more ancient than from the time of the assignment to the defendant, for that an account being then stated with Greenvil, and be paid off, there was no account to be precedent to that, and so could not be taken to be elder than 1650, and that so the plaintiff ought to be admitted to redeem, and the rather, for that the defendant had notice (which was admitted) of the deed 14 Car. I. by which the plaintiff claims before he took the conveyance from Greenvil; and whether the plaintiff should redeem, the Lord Keeper doubted, but took time to consider.

And now 21 Feb. 1671, this cause was finally heard before the Lord Keeper, assisted with Chief Justice Hale, Mr. Justice Wild and Baron Wyndham. [219]

A voluntary disposition of an equity of redemption is not to be favoured.

It was insisted for the defendant, the plaintiff was no party to the deed of the mortgage, and that the deed of 14 Car. 1. by which the plaintiff Chaumond claimed, howbeit it was made in consideration of Charles his marriage, was to Chaumond the plaintiff purely voluntary. And that albeit a voluntary conveyance would pass an equity of redemption, yet in this case where the plaintiff claims an equity by way of entail, it ought not to be countenanced in equity; for that the consequence of it would be to make an equity of redemption perpetual. If a mortgagor after a mortgage made may make himself tenant for life of that equity, with remainder in tail, as here, remainder for life, &c. which being but a right of action, a right to a bill in equity ought not to be so entailed. and that this was not such an inheritance as was entailed by the statute *de donis*, &c. but being a right of action vested in the father, with remainder to his first and other sons before Chaumond, there was no need to have made Chaumond defendant to the said decree. And Dorothy who was the tenant for life lived till 1668, so that the mortgage was all that time but of a dry reversion, and Margaret, the wife of Charles, who lived until very lately, and who had a title of redemption precedent to the plaintiff, did not seek to redeem.

An equity of redemption entailed tends to make it perpetual

An equity of redemption not entailable within the statute.

Wyndham was of opinion as this case was, that the plaintiff ought not to be admitted to redeem.

Judge Wyld. There is no fraud in the settlement 14 Car. I. and a decree against tenant for life will not bind him in the remainder in the case of an estate at law; and he did not see why it should bind in equity, and so he conceived the plaintiff was relievable.

Equity on an equity.

Chief Justice Hale. By the growth of equity on equity, the heart of the common law is eaten out, and legal settlements are destroyed; and was of opinion, there is no colour for a decree. In 14 R. II. the parliament would not admit of redemption; but now there is another settled course; as far as the line is given, man will go; and if an hundred years are given man will go so far, and we know not whether we shall go. An equity of redemption is transferrable from one to another now, and yet at common law if he that had the equity made a feoffment, or levied a fine, he had extinguished his equity at law; and it hath gone far enough already, and we will go no further than precedents in the matter of equity of redemption, which hath too much favour already; and concluded there should be no decree for the plaintiff in respect of the antiquity, and if he will redeem, he must come in time. It is but just to foreclose for not coming in time. It is just to deny redemption if he come not in time. And a decree to foreclose a tenant in tail shall bind his issue in an

Equity of redemption carried too far.

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Antiquity a cause to deny redemption.

equity of redemption, because that is a right set up only in a court of equity; and so may be here extinguished; and the estate moved from Charles to the mortgagee, and not from the plaintiff; and Charles was the visible possessor and owner. And it is a great sore, that mortgagees are but bailiffs; and the limitation to Chaumond was but voluntary, and so the plaintiff's pretence is not to be supported against a purchaser, for so a mortgagee is; and here it is made absolute by the decree; and if there be divers remainders of the equity, there is no reason to make them all parties.

A decree to fore close tenant in tail from redeeming, concludes his issue and the remainders.

The Lord Keeper concurred with him, and said he, it goes current, that if a mortgage be twenty years old, the mortgagee shall have no interest on interest. But herein he is not satisfied, especially in this case, where the defendant could not get into possession by reason of the estate for life to Dorothy, who lived till 1668, and was clear of opinion that the plaintiff ought not to be admitted to redeem. And made great difference between parties that come to redeem, who are no parties to the mortgage, and those that are parties to the mortgage. And so the bill was dismissed.

A difference between parties to the mortgage coming to redeem and strangers.

The *Earl of Athol, in Scotland*, against the *Earl of Derby*, and the *Administrator of the Countess of Derby*.

James, Earl of Derby, tenant for life makes a lease for one and twenty years to his wife of the Isle of Man, for provision for younger children, and dies; she agrees with the Earl of Athol, on the marriage of her younger daughter the lady Emilia, to give him 5000*l.* portion, and that he shall have the Isle of Man valued at 1000*l.* per annum for five years to pay it. Charles, Earl of Derby, his son, the defendant, opposed this lease, being made by tenant for life, and between baron and feme, but by the mediation of certain lords in parliament, Earl Charles and his mother came to a new agreement in the year 1660, that she shall have the one moiety of the profits of the Isle, and he the other. In 1661, they came a new agreement, that he should in lieu of the agreement pay his mother 500*l.* per annum, and in the close of the deed appoints his receiver for the Isle of Man to pay it. All these agreements were made by the countess on behalf of the Earl of Athol, to enable him to receive the 5000*l.* and then the countess dies.

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It was decreed by the Master of the Roll, that the Earl of Athol shall have his 500*l.* against the Earl of Derby, and his person to be charged, and the Earl of Athol shall not be forced to the Isle of Man, which is the place originally charged; for by the last agreement he is to pay 500*l.* per annum abso-

lutely, and in lieu of the profits let the Earl of Derby make what he will of them; and the appointment of the receiver to pay it is but directory, and if the receiver do not pay it, the earl must.

The Isle of Man out of the power of the court.

1 Roll. Abr. 373.

M. Pl. 1.

Maynard and others of the plaintiff's counsel held that the court could not by any decree bind the Isle of Man; nor if they should decree it, could they execute the decree there, it being out of the power of any sheriff. They also held that the letter of attorney being determined by the countess' death, that the court would not have made a decree for the earl, though her administrator is defendant, unless in the case of a marriage agreement, and that it was proved those agreements were made on his behalf. Afterwards sequestration was awarded against the Earl of Derby.

Whereupon a question arose, what time of privilege a peer hath, (viz.) whether twenty or ten days before and after session of parliament?

Privilege of peers in parliament when it commences and when it ends.

The Lord Keeper sent to the Lord Hollis and others to advise in it, and they produced two orders in the House of Lords, whereby it appeared they declared their privilege to commence from the *teste* to the writ of summons for their first coming to parliament. And that upon every session and prorogation their privilege is for twenty days after such session. And it is said in the orders, that it is sufficient time for them to come from all parts of the kingdom, and to return, and are in those orders desired to take notice of it and of the reason of it.

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These orders are, the one of the 24th of May, 1624, the other of the 27th of January, 1628, entered into the journal of the book of the Lord's house.

But it is said, the Commons never agreed hereto, and therefore think themselves not bound by it.

Note.—This sequestration was executed accordingly; but the Earl of Derby soon after dying, and the estate being intailed, the Earl of Athol lost the rest of his wife's portion.

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DE TERM. SANCT. HILL.

Anno Regis 25 Car. II.

IN CANCELLARIA.

The LORD KEEPER FINCH.

Hayes against Hayes.

A. seised in fee, deviseth to his heir, on condition that he pay to the daughter of A. 500*l.* at her age of sixteen years,

and on default, that he should enter and raise it; the heir deviseth to his mother for life, and afterwards to his brother in fee, and dies; the mother enters, the daughter is under age, and the brother having the reversion and inheritance, exhibits his bill to have the mother pay a part of the 500*l.* she having part of the estate as security for life.

It was objected, that the daughter is not of age, and so this bill is *quia timet* only; and it may be that the mother may live till the daughter is of sixteen, and then the daughter may enter and raise, and so the brother, who is the reversioner, should not be grieved; and the court would be vexed with vain suits if any one might be admitted to sue only *quia timet*, to prevent a remote possibility.

Tenant for life shall contribute with the reversioner toward the arrears of a charge or mortgage

But the court answered, that suits *quia timet* only were proper in law and equity. It is law of a *warrantia chartæ* in equity; as where A. grants a charge of 100*l.* per annum in fee, and deviseth to B. for life, remainder to C. in fee, and dies; C. exhibits his bill to compel the tenant for life to pay the arrears, else all will fall on the reversioner; and this hath been decreed; and the first cause about contribution was between and where A. had mortgaged the manor of Guilford for 2500*l.* and then deviseth to B. for life, the remainder to C. in fee, C. preferred his bill to force B. to pay his share of the mortgage money, and it was decreed that he should. And there have been twenty cases since of the like nature. So in the principal case there being a demurrer to this bill for the causes aforesaid, the defendant was ordered to answer; and then Sir John Churchil moved, and said for the defendant, that she should prove that it was the intention of the devisor here that she should pay nothing, which was not answered, but was admitted to be material.

Suits *quia timet* in law and equity.

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Post. 27.

The LORD KEEPER FINCH.

Butler against Bernard. February 24.

An administrator makes a mortgage of the intestates term, and makes A. his executor, and dies; B. takes out letters of administration *de bonis non* to the first intestate, and claims the residuary interest and trust of the term, and prays that he may have the benefit of redemption. But the court decreed the benefit of redemption to A. the executor of the first administrator, who had aliened the whole estate in law of the term, and was not possessed in *auter droit*, nor of any part of the interest thereof, but in his own right; and so it shall go to his executor, and not to B. the administrator *de bonis non*.

A term aliened by an administrator shall go to his executor and not to the administrator *de bonis non*.

DE TERM. SANCT. MICH.

Anno Regis 25 Car. II.

IN CANCELLARIA.

The LORD KEEPER FINCH.

Colonel Doyly against Perfull. October 25.

The husband cannot grant or charge the term of the wife in trust.

Nor forfeit it for outlawry or felony. Aliter of assignment after marriage by the husband.

The wife having assigned her term in trust for herself before marriage, and then the husband without joining with the trustees does mortgage the trust, and the husband being dead, the mortgagee being plaintiff, exhibits his bill to have the lands conveyed to him, or that they should redeem; and the court dismissed the plaintiff's bill; for since queen Elizabeth's time it hath been the constant course of this court to set aside and frustrate all incumbrances and acts of the husband upon the trust in the wife's term, and that he shall neither charge or grant it away. And it is the common way of proceeding for the jointures of women, to convey a term in trust for them upon marriage, that it may be out of the power and reach of the husband; neither shall he forfeit it by outlawry or felony; if for jointure or in pursuance of articles of marriage, or being the wife's term it is assigned before in trust, as here, or if on other good consideration it be assigned. But if it be an assignment after marriage by the husband in trust for the wife, this is voluntary and fraudulent against purchasers, and this was the great Exchequer Chamber case.

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DE TERMINO PASCHÆ.

Anno Regis 26 Car. II.

IN CANCELLARIA.

Davis against Curtis.

Ant. 16. 24. Nota, the bond determined the parol agreement.

Davis, executor of C. employed as a master of a ship by the East India Company, covenants with them that he should pay a certain mulct for every cloath carried, &c. in the ship, and took the defendant to be his mate, who made an agreement *mutatis mutandis*, with Davis, and gave a bond of 50l.

for due performance on his part; but he without Davis his knowledge, carried so many cloaths as the mulct came to 70*l.* which the company deducted out of the master's wages, and the 50*l.* bond would not satisfy, and therefore prayed relief and discovery of the testator's estate.

No relief
above penal-
ty in equity.

The defendant demurred, 1st, the relief of more than security by bond, not proper in equity. 2d. That part of the bill which stands for discovery of assets was ill, because the charge in the bill was not positive, that assets, or that any goods came to the defendant's hands; and ruled in both points accordingly.

Bill to disco-
ver assets,
and does not
charge that
any goods
came to his
hands, ill.

Cook against Bampfield. May 19.

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William Pierce prebend of Rutland-Denham leased the rectory of R. to Thomas Bampfield, George and Edward Bampfield, in trust for Thomas, who conveyed his interest to Sir R. P. but G. B. was no party, but beyond sea. The prebend lessor dieth, Tisdel his successor (on a surrender to him of the former lease produced to him, but G. B. sealed it not, so that in law it was void against G. B.) makes another lease to Sir R. P. for three lives, which lease, was for divers years enjoyed till all those three lives died. Tisdel being dead, Cook takes a lease of Duncomb, who succeeded Tisdel, for 400*l.* fine. George Bampfield comes from beyond sea, and sets on foot his title for a third part. The matter was by reference put to arbitration (the point of trust or no trust being before by direction tried by a verdict for Cook, that G. B. his name was used in trust for Thos.) and G. B. having by trial at law recovered one third part of the premises, the arbitrators awarded, that G. B. should permit Cook to enjoy the said third part, paying 16*l.* yearly to G. B. during his life. G. B. died; the plaintiff exhibits a new bill against Edward B. reciting the former, and prays relief.

Duncomb died, Aston succeeds in the prebendary; and before the last bill Aston for 120*l.* makes a new lease to Edward B. for three lives, yet in being. Edward B. was bound to Cook that G. B. should perform, which in all George his time was on all sides executed. Aston received the rents of Cook after Duncomb's death: 27th November, 23 Car. II. It was decreed that Edward and George B. should pay to Cook all the profits received, deducting the 16*l.* per annum, and that Edward B. should assign his lease to Cook for three such lives as he should name: and on a bill of review this decree was confirmed by the Lord Keeper Finch, 10th of May instant, Ellis and Littleton concurring.

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Lessee of a prebend mortgage his lease and after the day pays the money, and then surrenders, and takes a lease from the prebend, he hath good equity ag^t the mortgagee.

If the prebend die, equity shall not make the second lease good against the successor. Chancery cannot help in equity against an act of parliament.

The objections against the decree were, first that the lease of Duncomb was not good in law; being of the whole in possession and reversion, when at the making thereof George B. was tenant for life for one third part; which was not much denied, and being avoided by act of parliament this court might not supply it; and Aston the successor is not bound by any transaction of the account made in the time of his predecessor against an act of parliament. And it was as free for Edward B. to deal for an estate with Aston, the prebend, as for any other man, and that if there was any equity to support the lease against the lessee or his assigns, or against Duncomb predecessor to Aston, that equity should not bind Aston. Put case, the lessee of a prebend or bishop should mortgage his lease or part of it, and after the day pay the money, and then surrender and take a lease from the prebend; he hath good equity against the mortgagee; but if the prebend die, this equity shall not make the second lease good against the successor against the statute which binds all men and hath no saving of such rights of equity; and the Chancellor may not add to a statute to make a saving which the statute hath not made. An infant bound by statute of fines should not have been helped inequity.

But notwithstanding the decree was confirmed; for by the surrender of Thomas who was *cestuy que trust*, the lease in equity was avoided as to the then prebend, and therefore shall never be set on foot against a successor. Duncomb. takes 400*l.* fine and resigns when there can no more fine be made, and Aston would now set on foot the statute and a new fine, which appears against the practice.

The 2d objection. The purchaser from T. B. viz. R. P. took a new lease for three lives, whereby the purchaser had the full benefit of his purchase, and those new lives being now all dead, it is no reason that Cook should set on foot the interest of the old lease again.

The Lord Keeper. Nor shall Aston, nor Edward B. The decree was confirmed.

The Mayor and Aldermen of London against the Earl of Dorset. May 30.

Examination after publication, and after hearing.

Upon a commission of charitable uses, the question on appeal, was, whether certain houses were part of Bridewell belonging to the city for relief of the poor, or a part of Dorset House; which point was referred to law to be tried, and then to report.

A. B. moved for a commission to examine an old witness 80 years old, who was not discovered till now, and unable to

travel. If she was able to travel she would be examined at the trial; and though publication on hearing was past, yet the question being of free hold, and not properly triable at law, it was reason that the testimony should not be lost, and possibly the land thereby. The motion was opposed because of publication.

The Lord Keeper. The rule of non-examing after publication hath been strict in this point; but the court is the judge, and the examiners, here or by commission, are ministerial to the court; so he ordered a commission and examination.

Burges against Burges.

Thomas Burges after his inter-marriage with Elizabeth Hughs his first wife, by lease and release dated 24th July, 1669, in consideration of his wife's settling her lands upon him and his heirs (which was done by fine) conveys divers free-hold lands to the use of himself for life, and after his decease to the use of his wife Elizabeth for her life, and after the determination of the said estates, then to the use of the first son of the said Thomas, on the body of the said Elizabeth, to be begotten, and the heirs of the body of such first son; and for default of such issue, to the use of the 2nd, 3rd, 4th, 5th, 6th, 7th, and every other son and sons of the body of the said Thomas, on the body of the said Elizabeth, to be begotten, successively, and the heirs of the body of such son or sons; and for default of such issue, then if at the death of the said Thomas, the said Elizabeth shall be enseint with child, then to the use of Skinner and Clark, trustees, and their heirs, until the birth of such after-born child or children; and if it be a son or sons, then to the use of such son and sons, and the heirs of the body of such son and sons; and for default of such issue, to the use and behoof of all and every the daughter and daughters of the said Thomas Burges, on the body of the said Elizabeth, begotten or to be begotten, as well which shall be born, as which she the said Elizabeth shall be enseint with at the time of the death of the said Thomas, and the heirs of the body of such daughter and daughters, and for want of such issue, to the use of the right heirs of Thomas and Elizabeth for ever.

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Thomas Burges being likewise possessed of other lands by two leases for ninety-nine years, determinable upon three lives, by another deed bearing date with the fore-mentioned deed of settlement, for the consideration therein mentioned, did assign the said lease-hold lands to Skinner and Clark, two of the defendants, in trust to the several intents and purposes, and for the uses which are limited and declared of and

Limitation of a term being a remote trust, and tending to a perpetuity, void.

concerning the said lands of inheritance of the said Thomas Burges in and by the said indenture bearing even date with the said deed and assignment.

Thomas Burges had no son by the said Elizabeth, but had one daughter, which is now the defendant Elizabeth, who was alive at the time of the making of the said indenture, being 21st Dec. 1668. Thomas Burgess survived, and after married Ursula a second wife, by whom he had issue two sons and one daughter, and died intestate, and Ursula his wife is administratrix.

Qu. Whether the trust of the said leases doth belong to Elizabeth the daughter, or the administratrix.

After this cause was stated, and the Lord Keeper Finch had took time to consider it, he declared that the limitation (because it was a remote trust, and tended to a perpetuity) to the defendant Elizabeth, as daughter of Thomas Burges, was a void limitation, and on that reason decreed the two leases to the plaintiff as administratrix to Thomas Burges.

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DE TERM. SANCT. TRIN.

Anno Regis 26 Car. II.

IN CANCELLARIA.

Anonymus. July 2.

Where oath
must be made
of the want of
a deed, bond,
&c.

If the bill exhibited be grounded on the loss of a bond, oath must be made of such loss, because that such loss is that which intitles the court to jurisdiction of the cause, else the party has his remedy at law. No oath is required of loss of them, but only *ut supra*, where the oath doth entitle the court to jurisdiction. By the Lord Keeper.

An original
bill to exe-
cute a decree
against a pur-
chaser, claim-
ing under
parties bound
thereby.

Organ against Gardiner. July 2.

An original bill to execute a decree of lands against a purchaser, who claimed under parties bound by that decree, was allowed good on demurrer thereto, by the Lord Keeper.

Ashcomb's case. July 15.

[232]
Ant. 169,
170.
2 chanc. ca-
ses, 73, 7.

The bill was exhibited by the plaintiff, a feme covert and her friends, against her husband and two others, Mascall and S. The case was, that the plaintiff being a Dutch woman brought 4000*l.* portion to her husband, who agreed with her before marriage to leave a complete maintenance for herself and her children, not expressing what; the marriage took effect, but he declining in estate, her friends called on

him; and he thereupon assigned certain bonds, wherein M. was bound to him; and a letter of attorney was made after to S. to receive the money upon the bonds, who received the money of him. The bill was to have the money from M. and S.

Mascal by plea sets forth the payment to S. and that he had no notice of the assignment of the bonds. And this was allowed a good plea for Mascal. But S. pleaded a letter of attorney, and payment to him on good consideration, but did not deny notice; and therefore his plea disallowed, and the agreement and assignment of the debt in Holland where such agreement between husband and wife, and such assignment of bonds are good, and they are to be allowed here by the Lord Keeper.

Plea.
Notice.

Assignment
of bond in
Holland ac-
cording to
their custom
allowed here.

Anonymus. July 15.

A bill exhibited to have an account here of money collected by authority of commissioners of sewers dismissed by the Lord Keeper; for the commissioners are to take the account, and not the chancery. Otherwise in case of receivers by authority in case of commissioners of bankrupt; for there it is concerning private persons, but this of the public, and it was in vain to take accounts in that case in question, which the court cannot determine. And although objected, that a discovery is proper here, yet the bill was dismissed on demurrer.

Sewers ac-
counts.
Chancery
will not inter-
meddle with.

Difference
between
commission-
ers of sewers
and commis-
sioners of
of bankrupt.

King against Brownlow. July 21.

A bill was exhibited in chancery concerning tithes and bounds of a parish, which proceeded to answer and replication. Then he exhibited another bill in the exchequer, and there witnesses were examined, and now proceeds again in chancery, and replies. The defendant pleaded the proceedings and examination in the exchequer, and ruled good as to examination of the same matters, which being examined to there, were not to be examined in chancery.

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Witnesses
formerly ex-
amined in
another court
not to be ex-
amined here.
Suit for
tithes.
Ant. 25. 73.
post. 236,
229. Kelway,
96. a b. 100.
a. Hard. 180.

DE TERM. SANCT. MICH.

Anno Regis 26 Car. II.

IN CANCELLARIA.

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Norcliff and his wife against Worsley.

There was Thomas Worsley, Besail, Thomas le Ayle, Thomas le Pere and Thomas le Fitz. Thomas, great grandfather in consideration of 800*l.* and marriage of the grand-

An entail in
equity (not in
law) whether
the issue shall

be bound by the agreement of his father without fine.

father with Wood, covenants to make a settlement of the manor of, &c. to Thomas le Ayle and Wood, whom he was to marry, for jointure for the wife and the heirs male of Thomas by his said wife. Thomas, the grand-father, within one year died, Thomas, the father, then *in ventre sa mere*.

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5 Car. I. Elizabeth, the wife of Thomas deceased, obtains a decree against the Besail for the lands, for performance of the articles both for herself and son, father of the now defendant. Thomas, the father, 1652, obtains a decree to the effect of the former : it set out, that Thomas Besail after the articles, and first bill and second bill, made voluntary conveyances of the lands, whereby he had settled them so as the estate in law was now in Elizabeth and the son of John his second son, under power of revocation by deed, and died after. Thomas, the father, on marriage with Penelope his second wife (he then having issue the defendant Thomas by his first wife, and inheritable to the special entail,) agreed (as it is alleged) to settle the land on his second wife and their heirs by her ; and pending the suit Elizabeth conveyed away the lands to Thomas the defendant. Thomas, the father, being dead, Penelope his widow and her second husband exhibits a bill to have the lands settled on her for her life, viz. 300*l.* per annum part thereof, and to have other part thereof liable to debts ; for Thomas, the father of the defendant, had so ordained by his will in writing. After publication in this cause, Thomas, the son, exhibits his bill against Norcliff and his wife, grounded on an agreement by Penelope with Thomas to accept of certain lands, part of the lands in question of 100*l.* per annum, in lieu of jointure, dower, and all demands, which was executed seven years by enjoyment by Penelope.

Two questions arose. 1. Whether the agreement of Thomas, the father, to settle the lands, &c. on his second wife, did bind Thomas, the son, by reason that he was entitled in equity to an estate tail in the land, and therefore should not be bound by his father's agreement ? for if the land had been settled in tail, it could not bind the issue, and the right of an estate tail is descended on him ; and the plaintiff sued for her jointure raised on equity, but it is a puny equity to Thomas the grand-child. The considerations are on both sides the same, viz. marriage, agreement and portion ; only the defendant Thomas insisted, that his agreement by which he claims was in general terms for lands of 300*l.* per annum, and not for lands in question particularly. And also if it were for some of the lands by particular names with covenant that those particulars were 300*l.* per annum, if such agreement did bind as to the particulars, yet the covenant for the value, nor the will did not bind the other lands so as to have the value sup-

plied out of the other lands agreed to be entailed. And though if the lands had been entailed, though the father might have cut off the entail by fine and recovery, yet without fine or recovery they could not; and there is no fine, &c. nor any attempt or proceedings towards levying a fine or recovery.

As to this point the Lord Keeper Finch gave no resolution; but said, he conceived a difference in the case, viz. whether Penelope's agreement was in general for lands of 300*l.* per annum, or particular; and if particularly relating to the lands in question; whether so much was mentioned as amounted to 300*l.* per annum, or which in effect is the same? whether it were not for 300*l.* per annum, lands, part of the lands formerly agreed by the great grand-father to be entailed, or in general for 300*l.* per annum, lands, without relation to the lands *ut supra*, by the great grand-father to be entailed. And therefore there was much dispute as to the fact in that point.

But the Lord Keeper though he was not positive in the main point, yet said that as to the agreement by the father, whether to be avoided by the son, now defendant, that in case the lands had been entailed *de facto*, and agreed, no agreement could bind the issue without fine or recovery or other legal bar; yet he said the agreement to entail was not an entail; and though it raised an equity against him that made it, yet that equity is a creature of this court to be governed as conscience directs by this court: and said the statute *de donis* was an ambitious act in favour of the lords against the king; and for that vouched the Lord Ellesmere. But before he had said this there were some proposals of agreement: And at length the case was composed.

There was a second point which was fully proved, that must have ended the cause, viz. the agreement by Penelope, *ut supra*. But a dispute arose about the proof, whether the witness that proved the agreement could be read? for the agreement was not set forth in the answer to Penelope's bill, but was proved in that cause; and it was set forth in the bill against Penelope and her husband, but no proof thereof in that cause; so it was proved in one, and set forth in another cause. To salve which defect, the defendant Thomas moved, and had an order, that the depositions in either cause might be used in both, which order was after publication in the first cause, wherein the proof was made; but before publication in the second cause; so as the defendant in that cause had the advantage, having the liberty to see what was produced against them, and had liberty to examine.

Sir John Churchill, who was of counsel for the defendant, Thomas, yielded that they could not be read by his client.

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Where equity creates the estate it shall be guided by conscience.

4 Rol. Rep. 236.

2 Vent. 350.

Hard. 96. 1

Levin 239.

Hob. 203, 1

Rol. Abr.

379. pl. 7.

Post. 294.

Ant. 172.

Depositions read in both causes

Kelw. 98. a. b. 100. a.

Hard. 180.

Ant. 25. 73.

233. 229.

But for my part I know no prejudice to the defendant, being warned by the order, and might examine in the second cause. But the proposals of compounding the cause took off all debates.

Note.—The defendant, Worsley, had a subsequent order, saving all exceptions, &c.

Prat against Taylor.

The bill was to have an account of several sums of money, which the defendant, a fellow of Exeter College in Oxford, tutor to the plaintiff's son, received towards the necessary occasions of her son.

The Chancellor of Oxford by instrument in writing set forth the privilege of the university charters, and confirmation, &c. by act of parliament. And the defendant was a scholar, and resident, and that they had a court of equity, and prayed that Taylor might be dismissed.

A scholar of the University sued the chancellor puts in his claim of privilege by writing, disallowed.

The Lord Keeper did not allow the claim, and said, that cognizance of pleas in equity could not be granted, though precedents were shown of the same claim allowed in time of queen Elizabeth. He asked if any could be shown in the Lord Ellesmere or Conventries' time; but none could be shown. And thereupon disallowed the claim, saying it must be put in by way of plea. But withal declared it should not be on oath, but it should be sufficient to aver the defendant a scholar, resident, &c. without oath; and so he said it should be in case of outlavery pleaded, the defendant should not be put to aver the plea on oath, but without oath.

Bluet, a Dane, against Bampfild and others, Merchants of Denmark.

Bill dismissed by sentence given against the plaintiff in the court at Denmark.

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To be relieved against actions of trespass, for seising their goods in the island of, &c. on the pretence of breaking an inhibition of the king of Denmark, whereas by articles of alliance, between the crown of England and Denmark, free trade was allowed to all English in all ports of the kingdom of Denmark, whereof the island was a port. But in regard sentence was given in the court there for the plaintiff on the seisure, the bill was dismissed.

Anonymus. November 5.

Contempt discharged by a general pardon.

Process issued till proclamation was returned. Then came the general pardon.

The defendant appeared and demurred.

The plaintiff moved to set aside the demurrer; for though the contempt was pardoned, yet the delay was no less to the plaintiff.

The Lord Keeper. As to the contempt, the defendant stands *rectus in curia*, and consequently all contempts are likewise pardoned. Therefore proceed on demurrer.

Anonymus. November 5.

The Lord Keeper declared for a rule, that if after process of contempt the defendant put in an insufficient answer, and so reported, the plaintiff should not as formerly begin with process at the *subpœna*, but should go on to the attachment with proclamation and other process, as if the answer had not been put in.

A rule, that if a second answer be insufficient process shall go on where it was before.

Cox against Quantock. November 19.

The testator had two executors, and deviseth to them *residuum bonorum*, &c. after the debts and legacies paid; one of them died, his administrator sued the surviving executor to have moiety of the surplusage.

The cause came to a hearing. The defendant insisted that the executors were joint devisees, and took the residue as legatees, not as joint executors.

The Lord Keeper decreed for the plaintiff, for in case of executors the testator intended an equal share to his executors; and by Chief Justice Rolls' advice it was decreed, that where a devise was to two equally, notwithstanding which word equally, the devisees were joint; yet the intention prevents the survivorship.

A devise to two executors of resid. bonorum, one of them dies, the administrator uses the surviving executor for an account. A devise to two legatees equal, if it survives. (239) 2 chan. cas. 64.

The cause was disputed; but to the dissatisfaction of the bar decreed. For where the intention is secret and not declared, the secret intent must give way to the legal intent. And if an administrator, then an administrator *de bonis non* must have it. 19 November, 1674.

Chalfont against Okes. November 21.

A termor grants the estate in trust for himself for life, and after for his wife for life, and after to their child or children for their lives, and after to J. S. and whether the trust to J. S. were good, the Lord Keeper took time to advise, and now delivered his opinion that it was good. But if it had been to the heirs of their bodies, it had not been a good trust after such limitation to any other. He said, that in this and like cases the chancery altered the law; for at common law till Weldon's case in Plowden's Commentaries, judgment was given against the limitation, by devise for a term to one for life, the remainder to another, and so over. But the chancery decreed these limitations good. But if it be in such manner as to make a perpetuity, that may neither be in law nor chancery.

Contingent remainder of a term.

Negus against Fettiplace. November 21.

Fettiplace, tenant for life of a rectory in the right of his wife, deviseth the same to the plaintiff for twenty-one years, at 100*l.* rent, payable at Lady-day and Michaelmas; a fortnight before Michaelmas the wife died; the tenant sent to Fettiplace notice thereof; Fettiplace and the plaintiff came to an agreement; on which Negus gave bond to Fettiplace to pay 80*l.* (Michaelmas' rent,) to Fettiplace, and Fettiplace agreed to save him harmless against all others for that rent, and now sues to be relieved against the bond, because no rent was due. and no consideration for the bond, and had a decree against the bond, though Mr. Attorney objected, and pressed it, that there was no fraud, and the whole truth was known, and it was *in foro conscientia*. And the tenant having taken all the summer profits, should pay for them, at least in proportion.

Bond to pay
an agreement
to indemnify
him relieved
ag't the bond
without pay-
ment.
Ant. 85. 86.

Hard. 200,
204.

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Cary against Appleton. November 26.

1. The husband deviseth the jewels which were *paraphernalia* of his wife, and died. Decreed to the wife.

2. The husband deviseth his goods to be sold for raising of portions to be paid to his daughters at their ages of eighteen, or marriage, and that the same be raised out of his rents, issues and profits of his lease lands, if the goods were not sufficient, and the rest after sale and profits of the goods and leases, as aforesaid, to other uses. One sister was paid, the other comes of age, the goods were not sufficient. The dispute was, whether the leases might be sold? For upon these cases they are not to be sold; the rents and profits are liable.

Raise out of
profits implies
a sale.
Bertue and
Stile 28 Jan.
27 Car. 2. in
Cancellaria.

The Lord Keeper. In the Lord Cornbury's case it was decreed, that the devise of profits gave power to sell; otherwise if it be of the annual profits. A devise of the profits is a devise of the land; and the father did as much intend a provision for his daughters as for his son. And I take the difference where the devise is of the profits of a chattel lease, and where of lands, as in this case. For if he had not directed a sale, the leases had been liable to the portions, and so the affirmative words shall not bear a negative sense to exclude the sale of the lease lands.

Conveyance
by tenant in
tail supplied.

Bokenham against Bokenham. December 4.

Edmund Bokenham, the plaintiff's great grand-father, made a settlement of divers lands and manors, *inter al.* Stockmash, which estates descended to Sir Henry, his son, in tail. Sir Henry, in consideration of a marriage to be had between Wiseman, his son, and Grace Davies, makes a deed feoff-

ment, to the use of himself for life, the remainder to Wiseman for life, remainder to the first, second, and other sons by Grace. This deed is endorsed generally (livery made to J. S. appointed by Paul Dawes, the feoffee thereto,) the marriage takes effect, Wiseman and Grace have issue Henry Walsingham, Paul the plaintiff, and Hugh the defendant, and six other sons. Sir Henry after levies a fine to Walsingham, then his eldest son; and this was to the use of Sir Henry and his heirs. Walsingham dies, and he conveys the manor and seignory to the defendant, the fourth son of Stockmash only, and dies. The defendant enters, supposing that livery was not well given, because the letter of attorney to take livery was lost, as he supposed.

Lord Keeper decreed, 1. that the letter of attorney should be supplied, and livery admitted; though it was objected, that this was in effect to decree a discontinuance, which is a wrong and an unlawful act, and that it was,

2nd, to assist a remainder man in tail in a third remainder (for he was the third son) against a legal fine of his father, tenant in tail, and whose fine was a bar to him in law. And also against the acceptance of the fine by Walsingham, who joined with Sir Henry, who had power by the recovery to have barred the estate of the plaintiff.

But to this last the Lord Keeper said, the grandfather might have the conveyance made by himself in his own hand; and it is apparently so, for he recites in that deed that he was tenant in tail, and he recites not the feoffment made by himself.

Crofts against Wortley. December 9.

A former bill depending was pleaded in bar of a second: but though both bills were of the same matter and effect, the later had some new matter.

Ordered, that being the plea was good, the plaintiff should pay the usual costs of a plea allowed. But the defendant to answer the second bill, and the former bill dismissed with 20s. costs.

Anonymus.

There was a decree for 5,000*l.* on account against the father in execution, whereof the process was carried to a sequestration of the lands, which the father had at the time of the decree, and settled on debate on the heir of the father, though he also made title thereto by conveyance made to the father.

The question grew, whether the conveyance was revocable, or not? For if it were revocable the Lord Keeper would

Letter of attorney and livery very supplied in equity.

4 Leon. 2. 2.
Vent. 350.
1 Lev. 338.
2 Cas. chanc.
30. Ant. 104.
105.

Former bill depending, yet answer the second bill.

1. Sequestration ag't the heir.
2. Purchasers with power to revoke.
3. Not ag't a voluntary conveyance.

keep on the sequestration, though the decree was not for lands, but for personal duty. And on producing several conveyances, the case was, that before the suit, about 1663, the father settled the lands voluntarily on himself for life, the remainder to his son, with remainder over; provided he might by deed revoke those uses; but it was now farther insisted, (viz.) there was not express power to limit other or new uses, but only to revoke. Afterwards, and before the decree or bill, the father revokes the former uses, and by the same deed limits an estate to his son; in which second deed there is no power of revocation; but though it was voluntary and for natural affection, was absolute.

Limitation of
new uses,
good, the ex-
press power
being only to
revoke.

The question was, if the limitation of new uses was good, the express power in the first deed being only to revoke.

The Lord Keeper declared his opinion clearly that it was, and therefore discharged the sequestration.

DE TERM. SANCT. HILL.

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Anno Regis 26 & 27 Car. II.

IN CANCELLARIA.

Sir James Bellingham, Nephew of Sir Henry son of Allen Bellingham against Elizabeth Lowther, Agnes, Sir John Wentworth. January 14th, 1674.

9 Jac. Sir James, the grandfather of the plaintiff, settled certain free-hold lands in Westmorland to the use of himself for life, the remainder to Henry his son, and the heirs male of his body, the remainder to Allen his second son, and the heirs male of his body, the remainder to his own heirs; and covenanted to settle copy-hold lands in the same manner, and died, 10 Jac. the free-hold was settled; but *non constat* the copy-hold were, but Sir Henry surrendered to the use of him and his sequel.

1649. Sir Henry having suffered a recovery of the free-hold, covenants with Willoughby, &c. to settle the free-hold lands on himself for life, the remainder of part to Katherine his wife for part of her jointure, the remainder to the heirs male of himself by Katherine; the remainder to the heirs male of his body, the remainder to Allen, and the heirs male of the body of Allen, the remainder to the heirs of Sir Henry, and covenanted with the same persons to settle the copy-hold by surrender to himself for life, the remainder to Katherine in full of her jointure, the remainder to the heirs male

of Sir Henry by Katherine, the remainder to the heirs male of Sir Henry, the remainder to Allen and the heirs male of his body.

Sir Henry Bellingham coming to make a surrender of the copy-hold, fell sick by the way, but made a letter of attorney to others to do it, but died before it was done. The free-hold lands remained to Sir James the son, and heir male of Allen who now exhibited his bill against Thomas Lowther and John Wentworth, to whom the copy-hold lands descended as heirs general for want of surrender. The scope of this bill was to have assurances of the copyhold, and to be relieved against actions at law.

There were divers matters in the bill, but this was the effect and substance of the case upon the plea. And it was said that this covenant was but voluntary as to Allen, because he was no party to the covenant, nor within the consideration of the marriage, or portion. And in case of sale for money if any sale had been made it might be fraudulent as to Allen, and yet be good as to Katharine, and the issues of the marriage, as it was in Sir John Jacobs' case. And if one make a voluntary conveyance, to a younger son, the same shall not be made good in equity against the heir at law, if it be a voluntary conveyance, and defects in law; and if it had been executed by surrender in the principal case, yet Sir Henry might have cut it off by the recovery. Deed fraudulent as to one and good as to another.

The answer to these objections endeavoured and offered was: 1st, That Sir Henry here expressly intended to preserve the name and male of his family before his daughters, though they should happen to be his heirs; for he limits the estate to his own heirs male, and immediately after to Allen, and his heirs male, which was likewise done by Sir James his father, and that was consideration enough, (viz.) not only his name, but his blood, as his brother was; and the continuance of his name in his blood was not only a good consideration, but such as prevailed with old Sir James and Sir Henry above the affection of the heirs general: and the consideration of the deeds of covenant is not only the marriage of Katharine, but continuing the lands in his name and blood. And the covenant binds Henry and his heirs; and though the covenant be with others, and not with Allen, yet the covenant is obliging to the heir, and puts a tie and obligation on Sir Henry and his heirs, and so differs from a voluntary conveyance without execution; for there is no tie in that case, no man at all is bound by it: it is merely void, and so is not this covenant. And though it be true, that if the surrender had been made, and thereby Henry tenant in tail, with remainder to Allen, yet he might by recovery have barred the remain- [245]
Difference between a covenant to settle lands and a voluntary conveyance.

der ; yet unless he had made some attempt that way, his intent and covenant stands still good, and differs from Worsley's case fol. for there was an act and endeavour to cut it off, but no such here.

Lord Keeper. Can the plaintiffs amend your case on proof?

Churchil. They cannot ; for we admit the whole bill.

Lord Keeper. If Sir Henry had had a son by a former wife, you could have no relief against him on this covenant, which as to the plaintiff is merely voluntary, and matter of kindness. And if Sir Henry and Allen were both in life, Allen could not enforce Sir Henry to execute the covenant ; yet Katharine might ; for it were vain to decree that to be done by Henry, which Henry might undo the next day ; and so it was resolved in Hockley's case, the younger brother goes away with 1500*l.* per annum, and the heir general has but 200*l.* per annum, copyhold. And for the reasons given dismissed the bill 14 Jan. 1674.

Halloway against Collins. February 6.

A child's legacy paid to the father, who failed, the payment decreed.

A legacy of 125*l.* was given to the plaintiff, being but ten years old, and at that age was paid to the plaintiff's father, who after died insolvent, the infant at full age sued the executor of the devisor for the 125*l.*

The Lord Keeper held it good payment ; but was pressed very much by the Attorney General of the ill consequence ; for the law must be the same if it were 1000*l.* and extends to other cases of like nature, not to legacies only.

Lord Keeper. What should the executors do ?

Attorney General. Have taken security to repay it to the infant, or sued here to have it paid.

Lord Keeper. It may be so where a legacy will bear the charge of suit, but not else, and delivered his opinion accordingly. But the defendant being put to prove the payment, did prove likewise that the executor took a bond, which the court pressed the defendant to show. Whereupon the solicitor in the cause said he had it not, but would produce it by the next day. But said it was a bond to the executor to save him harmless.

Lord Keeper. Then he paid on the security at his own peril.

Churchil desired time to show the bond till the next day, for we may not trust the judgment of the solicitor what the same is. It may be it is to pay to the infant at his age.

Lord Keeper. I shall believe the worst, unless you show the bond, therefore decreed the executor to pay it.

Hole against Harrison. February 17. Et e contra.

Hole, Harrison and S. were bound in a recognizance to the chamberlain of London. The plaintiff Harrison was sued thereon, and paid the whole money, and now sued Hole, who was bound with him for contribution. Hole, Harrison and S. being all bound, and J. H. was dead insolvent, and S. was run away. The question was in what proportion the contribution should be, viz. of a third or moiety? Decreed a moiety, for S. is insolvent.

Three bound in a recognizance, one is sued and paid the whole, another is insolvent, the third is sued for contribution, he shall contribute a moiety and not a third part.

Sir Holland and his wife, against Blandy. Feb. 17.

The wife endowable of two manors in Surry and Stratton in the county of Wilts, which consisted of copyholds, is endowed by indenture of the heirs of the manors in the county of Surry, and by parol agreement was to have a third part of the rents and profits of Stratton, and the rents were accordingly paid to her in proportion for thirty years and more. The copyholders purchase the inheritance of their respective copyholds in 1647, and shall pay their rents in proportion, during the ancient lives of the copyholders they purchased for money, the lives being dead on which the copyholds depended, the plaintiff sued for the third part of the improved value. The defendants pretend that they had no notice of the agreement, and being purchasers, without notice were not to be obliged thereby.

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The plaintiffs insist that they had notice, and so the payment of the proportion of the rents proved, and it was publicly notified at the courts of the manor, and divers of the tenants had abatement in their purchase, though the defendants denied they had any.

At the rolls the plaintiff had a decree for the rents and improvements.

The Lord Keeper on appeal reversed the decree as to the improved values, and confirmed it as to the rents, and left the plaintiffs to take their course for their fines, for which there was an agreement; but as he said there was none for the third part of the improved values. And it was then pressed the defendant must have paid fines, if they had not purchased the fee, and by their purchase the plaintiff, who but for this agreement could have had dower of the lands, the copyhold being determined, and the act of the copyholders shall not keep the plaintiff from dower and hinder her from fines. And therefore it was prayed that some course might be taken in that.

The Lord Keeper. I leave you to your course.

The widow of the lord decreed to be endowed of the third part of the improved values of the copyhold, but reversed by the Lord Keeper as to that. Act of the copyholder not to hinder the lord's wife of dower.

Jacob against Thatcher. February 17.

Purchaser
without no-
tice not pro-
tected.

The plaintiff had a jointure made by her husband of lands subject to a judgment, which Thatcher purchased in, and did extend the judgment, and took a lease from the husband, who died.

Decreed that Thatcher shall not hold over by the lease, since the profits taken after the extent were enough to satisfy the judgment according to the true value, nor shall hold over by the extent after the extended value to protect his lease, although in truth he did purchase the lease for valuable consideration, though also he had taken a lease first and for valuable consideration and without notice of the jointure, and then had bought in and extended the judgment, he might protect his lease thereof. But Sir John Jacob and he, (viz.) Thatcher, when the extent is laid on, and in a way of satisfaction by the true value, shall not turn the debt on the jointress. The extent it seems was returned and filed, but Thatcher entered not but by a lease subsequent.

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Hixon against Wytham.

Clement Wytham seised in fee, made a writing in this form : this indenture made the day of, &c. between Clement Wytham of, &c. of the one part, and James Orbel of, &c. William Skinner of, &c. of the other part : whereas there are divers debts owing to Clement Wytham, and having an intention not only to raise portions for his younger children, but also to raise money for the payment of his debts, although his personal estate came not in. Now the said Clement Wytham in consideration of 5*l.* doth grant, bargain and sell to the said James Orbel and William Skinner all those lands, &c. mentioning the lands, but no estate, on trust to sell after his decease, the money raised by sale to be employed as follows, and named divers persons to receive several sums, and the rest of my said money, and my plate, and other my personal estate of me the said Clement, (and here in this part changeth the person, and speaks in the first and not in the third person,) I give and bequeath in manner following, and appoints to several persons several sums, and then addeth, I hereby name the said James Orbel and William Skinner my executors to the uses aforesaid.

1st. It was questioned, whether this was a will or, not, being made in the form of an indenture, and as above. But the defendants deserted that point, and yielded that it was a will, and the Lord Keeper accordingly.

2d. The plaintiffs are creditors of Clement, the testator, and sued to be satisfied out of the trust, they not being nam-

ed, and on his sale, if the particular legatees be paid, little or nothing will be kept ; and there is no clause in the will that his debts should be paid. But on the other side the words having an intention not only to provide portions, &c. but also to pay his debts, &c. and making his executors to the use aforesaid, refer to the whole.

The Lord Keeper pronounced this decree, that the plaintiffs, the creditors, should be paid before the legacies, and not only in proportion, but before them ; for a man may not give but what is his own ; but what he hath *ultra æs alienum*. Therefore the legacies shall come into the trust after the debts. But a debt without specialty, is as much as a debt *jure naturali*, and in conscience as a debt by specialty, and therefore there shall be an equality with debts by specialty where conscience is the judge. But the Lord Keeper being urged, that the precedents of the court had been otherwise, (viz.) that when lands are to be sold for payment of debts and legacies by trustees, the legacies were in equal degree with debts, unless it were such debts as charged the lands ; and the reason is, because only the will of the owner makes the land liable, and gives no preferment to the one before the other. Whereupon the Lord Keeper gave time to present precedents to him.

Lands devised for payment of legacies, made subject to debts.

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Debts on simple contract to be paid in proportion with debts by specialty where lands are devised, &c, Whether debts and legacies are to be paid equally, where lands devised for payment of both.

Leech against Leech. February 27.

The bill was by trustees to guide and direct them in divers trusts, and to protect them in executing the same, which the court now did, (viz.) the father made a lease in trust with reference to his will, and thereby devised to several of his daughters 500*l.* to each, to be paid at one and twenty years, or marriage, and if any or all died before, then to others. The daughters had no other portion, nor no maintenance, and direction was prayed by the trustees, whether they might allow the daughters maintenance.

Where there is a devise over of the portion the court can allow no maintenance out of it ; otherwise, if no devise over.

The Lord Keeper. No : because of the devise over ; else it might have been done.

2. The father tenant *pur auter vie* made a lease for 99 years, as was pretended, but was to A. and B. and their heirs may *habendum* for 99 years, which Mr. Attorney pressed was void, and then the trust annexed to the lease is void.

The Lord Keeper. The trust is for payment of debts, and that shall support the trust.

3. Trust for payment of debts generally is good against an heir, though no creditor be party to the deed, nor debt expressed in particular, nor covenant in the lease to pay.

But the Lord Keeper said, he would not maintain it against a purchaser.

If a trust be for payment of debts, it may support a conveyance, otherwise void.

Trust for payment of debts generally good against an heir tho' no creditor party But not so against a purchaser.

Whorewood against Whorewood. Feb. 22.

Rep. Chanc.
1 Part. 223.

A decree for alimony quousque cohabitation. The husband exhibits a bill, and offers to cohabit.

Note, This in a time of the commissioners who had this jurisdiction especially given.

In the late times of the great troubles, the commissioners of the great seal, as they were then called, had jurisdiction given them in the case of alimony between Mr. Whorewood and his wife. A decree was made that Mr. Whorewood should pay 300*l.* per annum to his wife till they cohabited, and during their separation, and assurances to be made for payment thereof, with condition to be void in case of reconciliation and cohabitation; but the assurances were made without these conditions. Mr. Whorewood for six years paid not the 300*l.* per annum, the decree was confirmed by the general act touching judicial proceedings. Mr. Whorewood did not rest there, but exhibited a bill of review, and thereon the decree affirmed, for the bill was dismissed. Further struggling was by Mr. Whorewood, and references, and now he exhibits this bill that the 300*l.* per annum might cease, because he offered to be reconciled, and desired to cohabit with her, and use her as his wife.

The Lord Keeper was assisted now by Chief Justice North and Justice Rainsford.

On the defendant's part it was said, that the act being made when there was a suspension of ecclesiastical jurisdictions, the same was conferred to the commissioners who were to act according to the laws ecclesiastic, and so ought this court now to do; and it cannot be conceived when there is a separation and allowance of alimony *quousque*, &c. that a single declaration of the husband without consent of the wife should free him from alimony, for then he might so declare and avoid the sentence the next day: but it must be by her consent, or on clear proof that it is more wilfulness in her, and that the fear she had was justly removed, which in this case appears by her oath not to be. And she had great cause to be in fear by sixteen years struggling against the sentence, and his exasperation by her prosecution of him, and the dismissal of his bill of review had now foreclosed him to sue for relief by way of original bill. And the decree is for 300*l.* per annum till cohabitation by consent, which cohabitation must be by mutual consent.

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Absolute conveyances guided by decree that directed them.

Where a decree is temporary or for special ends an original bill lies to put an end to it.

Resolved 1st. That though the assurances were absolute without the conditions or limitations *quousque*, &c. yet the deeds being in performance of the decree (for so it was expressed in the deeds) yet they should be ruled and guided by the decree.

2. That an original bill was proper in this case, notwithstanding the bill of review dismissed, viz. the court is invested with the same jurisdiction which the ecclesiastical court had, and when a decree is temporary and for special ends, an ori-

ginal bill lieth to put a period to it, and to show the purposes of the decree satisfied.

3. That the court could not discharge the arrears.

Justice Rainsford was of opinion, that neither the wilfulness of the wife, nor pretences of kindness, or desires of co-habitation should prevail either way, and therefore that a trial should be made, and she to be ordered to co-habit for half a year or the like, to see what would be; and the decree of alimony to be suspended, and after ordered or suspended, as there should be occasion.

The decree to pay till co-habit, and now the husband offers to co-habit, the court cannot in this case discharge arrears. No alimony can be decreed, but by consent, unless first a decree for separation.

North. The decree hath no force but from the consent of the parties, else the ecclesiastical court could not decree alimony, as this case is; for if they had decreed a separation then they might also decree alimony, but not alimony alone saving *pro expenses litis*. But here is no sentence of separation, and therefore the husband in this case may sue his wife, *ad obsequia debita* in the ecclesiastical court, or sue those that detained his wife at the common law notwithstanding the decree here.

The Lord Keeper. I cannot decree a separation. I shall not continue the alimony to the wife, if she will not co-habit, nor decree the wife to co-habit; but shall not discharge the alimony or sentence, but keep it in suspense. But the wife shall return to her husband, who shall maintain and use her as a gentleman and a good husband ought to do, wherein if he fails, I will hear the wife's complaint with favour, and lay on the decree again, as cause shall be; but now suspend it, saving to her the arrears. But she shall immediately return, and if not, she shall have no benefit of the alimony till she do so, but take her remedy in the court ecclesiastical.

Erswick against Bond. February 22.

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Erswick and his wife seised in the right of his wife, conveyed the lands to the use of himself for life, with power to make leases, and sold the lands; and to secure the purchaser against such leases, as might have been made, took a covenant against the vendor that within two years he would convey other lands to that intent; the two years being past and no collateral assurance made, next term after the two years expired the purchaser exhibits his bill to have collateral security according to the covenant.

A covenant to secure the purchaser by other lands not decreed.

The Lord Keeper dismissed the bill, and takes a difference between covenants for further assurance of the lands sold, and collateral security of other lands to incumber the estate; and the two years being elapsed dismissed the bill; *ex relatione* Sir John Churchill of the plaintiff's side.

Diversity between covenants for further assurance and collateral security.

Williams against Williams. February 23.

A new bill after dismission on hearing on suggestion of notice which was not in issue in the former cause.

Notice not denied, yet in issue and not proved after hearing, may have defendant's oath on a new bill.

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A former bill was exhibited, thereby to set up an agreement to charge the defendant's lands. To which the defendant set forth that he was a purchaser for valuable consideration; and issue being joined thereon, the defendant proved his case, and the bill was dismissed; and now a new bill on the same equity was exhibited; but now charges the defendant that at the time of his purchase he had notice of the plaintiff's equity, viz. an agreement, &c. it not being charged in the former bill, and that the defendant had notice, nor by the defendant set forth that he had no notice, nor examination to that point. The proceedings in the former cause were pleaded in bar; for this course will make suits endless, and no man will charge notice in the like case, but try upon one point first, viz. purchaser or no: but the plaintiff should before hearing have exhibited the bill he doth now, but now it is too late.

The Lord Keeper over-ruled the plea, with this further declaration, that the defendant's answer should not conclude the plaintiff; but though he denied notice, yet the plaintiff should examine thereto. He said also that in case examination should be made of notice, and no proof of it, if the notice had been denied in the former suit, yet the plaintiff's bill to have the defendant's oath would lie, but then the defendant's oath should not be conclusive.

Maynard against Moseley.

Sir Edward Mosely conveyed lands to the use of Thomas Leigh, Esquire, &c. and their heirs on trust to raise 3,000*l.* for Mary (his only daughter) and if he should have more than one daughter, then 2,000*l.* a piece. He had Ann a second daughter and died: Ann died young and intestate, Sir Edward, brother of Ann and Mary surviving Ann; afterwards Mary marrying unto Joseph Maynard, Edward the brother gave 5,000*l.* with her, and 7,000*l.* more he agreed to pay on contingencies: Joseph releaseth to Edward the brother all demands and portions which he may claim in right of his wife, except the 5,000*l.* and 7,000*l.* and other particulars. Young Sir Edward dies without issue, and devises his lands to Moseley, the defendant, and by such death of Sir Edward the 7,000*l.* grew due. Mary takes administration of her sister Ann and sues for the 2,000*l.* and also the 4,000*l.* There were other circumstances of the agreement by Sir John Maynard, father of Joseph, which induced the court to dismiss the bill as to the 4,000*l.* for the lease for fifteen years, whereout the 4,000*l.* secured was in Joseph Maynard in right of his wife; but as to the 2,000*l.* my Lord Chief Justice Hales and Vaughan

agreed that it belonged to Mary as administratrix, and the agreement did not discharge it, for if a stranger had taken administration he should not be barred, &c.

The Lord Keeper gave reasons for his differing in opinion from the judges, but decreed the 2,000*l.* according to the opinion of the judges.

This was a bill of review brought by Joseph and Mary against a decree made by the Lord Keeper Bridgman; and to which bill of review Moseley demurred, and his demurrer overruled by the Lord Chancellor the Earl of Shaftsbury, who was assisted by judges. The cause was heard *ab integro* by the Lord Finch, assisted by the two Chief Justices, *ut supra*, and decreed *ut supra*.

Another part of the case was decreed against Joseph Maynard and his wife, and was (*viz.*) articles of agreement were made between Sir Edward Mosely and his wife, Thomas Leigh, &c. friends of Sir Edward Mosely, one for him, the other two trustees for the lady, by which on Sir Edwards' part, and on his behalf some lands in Lincolashire were to be sold for payment of his debts and annuities to be paid the lady for maintenance of her children, and 400*l.* per annum to the lady for her separate maintenance and jointure, of 5,000*l.* per annum out of several of the lands for the jointure of the lady after Sir Edward Moseley's death, and the lady being seised in fee of the lands of 300*l.* per annum in Derbyshire. It was agreed that the same should be settled, and that after her death it should remain or descend to the said Sir Edward, and the issue between him and his lady begotten and to be begotten, the remainder to the lady and her heirs in such sort as she shall not have power to alien from his and her issue.

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And after within the year an indenture was made and sealed by Sir Edward and the lady and his trustees, whereby it was agreed, that fines should be levied of all the premises, and the use for sole separate maintenance, annuities and portions for children and jointure, appointed according to the said articles; and for the Derbyshire lands the use was to be to Sir Edward for his life, remainder to the lady for her life, remainder to Sir Edward the son for life, with remainders to the first, second, third, &c. and other sons of Edward the son, and the heirs male of their bodies, remainder to the daughters of Sir Edward, and his lady in tail.

Afterwards cross suits arose in Chancery, the ladies trustees plaintiffs on the lady's behalf against Sir Edward, and Sir Edward plaintiff against them, in which the annuities and separate maintenance are decreed, and that fines should be levied according to the articles and subsequent deeds, and

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inrolled ; but though the lady had formerly joined in fines as well of the Manchester lands out of which the separate maintenance as to 100*l.* part thereof was settled ; as to the lands to be sold for debts no fine was levied by the lady of the Derbyshire lands nor of the Staffordshire jointure lands by Sir Edward, but after the decree the separate maintenance and annuities were paid while Sir Edward lived, saving about 200*l.* of the annuities which were arrear at his death. And whereas no particular lands were appointed by the first articles for a jointure, by the next deed Manchester 100*l.* per annum, and the Staffordshire lands were limited to the lady for her jointure.

Sir Edward being dead, the lady entered into the Staffordshire lands and Manchester rents. and held them whilst she lived, and received the arrears of the annuities.

Heir at law by marriage agreement became a purchaser in equity, and not liable to pay debts of his ancestor.

After her death Sir Edward Moseley, son and heir of Sir Edward and the lady, were sued by the creditors of the lady, to whom she had bound her and her heirs in bonds to discover assets of his mother's estate, particularly the Derbyshire lands.

To which by answer he set forth the agreements, deeds and decree, and that thereby he was a purchaser in equity for his life, with remainder, &c. and not liable to the debts of his mother as her heir ; and the creditors proceeded no further. After which Sir Edward, the son, mortgaged those Derbyshire lands, and after devised them *inter alia* to Edward Moseley the defendant.

Feme though not bound by her agreement during coverture, yet acting according to the agreement when a widow is bound by it.

Joseph Maynard and his wife were plaintiffs for the Derbyshire lands, Ann the sister being dead without issue ; and prayed to have recompence for the alienation against Edward Moseley devisee, the executor of Sir Edward Moseley the younger, upon the equity. But although the lady was not bound by her agreement made during coverture, yet when after the death of her husband, she received the arrears according to the agreements and decree, and enjoyed the Staffordshire jointure according to the last deed, she was now bound by what she did being a widow, and Sir Edward survived having on his oath claimed those grounds as purchaser, and not as heir to his mother, and thereby freed himself from the debts of his mother, he might not if he had been sued by his sister have claimed other estate, and consequently his trustee could not, and therefore the sister ought to have the power to and in the deed, and satisfaction for what it should cost her to redeem, he having devised his lands for satisfaction of his debts, legacies and engagements. But the bill of the sister was dismissed by the Lord Chancellor Finch, Hales and Vaughan chief justices concurring. It was on construction of the first articles.

Papilion against Hix.

On a Plea.

Hix, a tinner in Cornwall articulated with Papilion to sell and deliver to him sixteen tons of tin free from all customs and duties, part of the price paid, the rest secured to be paid. Hix, after the tin was seised, for that the coynage had not been paid, which by the custom of the stannaries is a forfeiture in case that the tin be sold before coynage paid or secured; and because the forfeiture was by Hix, Papilion sued him to be relieved, he having covenanted to deliver it custom free.

The Lord Chancellor dismissed the bill. I will break this trade between the tinners and the merchants; for by this trade the king is couzened, and the coynage duty seldom answered. The tinner pays no duty, selling to the merchant in small ingots; and if it chance to be taken, he affirms he did first pay the coynage, and then puts it into small pieces easy to hide and transport: and if he be spied, pretends he coined it, having first coined two or three slabs, and all the rest he transports and sells in little pieces by colour of coining one or two slabs. I will break this trade.

The tinner articles to the merchant custom free; after delivery it is seised for custom, and the merchant sues to be relieved, but is not, for it is in fraudem regis.

The LORD KEEPER FINCH.

Chamberlain against Chamberlain and others.

The case was, that Thomas Chamberlain, Esq. being possessed of leases of 3,000*l.* yearly, and owing several great debts, made his will, and made his wife Elizabeth his executrix, who proved the will, and paid the debt as far as the chattels personal or stock would reach, but no farther: and there being yet debts unpaid above the value of the leases, she assents to a bequest of the said leases made by the said John Chamberlain in his said will, (viz.) to the said Elizabeth for her life, and after to John Chamberlain the eldest son of the said John Chamberlain for his life, and after to the first son of the said John Chamberlain the son, and the heirs male of the first son, after which assent Elizabeth dies, and leaves Mr. Croft her executor, who came to article with the plaintiff to sell the said leases to the plaintiff for 900*l.* whereupon the plaintiff exhibits his bill against the defendant John Chamberlain the son, and Thomas Chamberlain the first son of the said John Chamberlain the son, and Mr. Croft the executor. And now the question was, whether debts being unpaid at the time of the said assent, and nothing liable to make good the said debts saving the said leases, the leases might be assets in the hands of Mr. Croft, so that he might

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Leases are assets to pay debts notwithstanding the assent of the executor to the devise of them. Legatees shall give bond to refund in case of dormant debts arising. The nature of a legacy. Legacy not attachable by foreign attachment. Infant executor assents to a legacy. Trustee of a term after the assent of the executor sells it bona fide, if good against creditors. Executor of an executor liable to a devastavit made by the first executor.

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Mortgagee forfeit shall have interest for his interest. Mortgagee assigning, the assignee shall have interest for the interest then due.

sell them to answer the said debts, notwithstanding the said assent; or whether the said bequest of the leases were vested in the remainder, according to the said devise by the assent, and could not be divested by the sale of Croft the executor.

And now the Lord Keeper declared and decreed Croft to convey according to his said articles to the plaintiff, and that the said leases should be assets notwithstanding the assent. And first he relied on this rule of court, that an executor shall not be forced to pay legatees until the legatees shall give bond to refund in proportion, or in the whole, for the satisfaction of debts if any do appear unsatisfied. Yet the legatee upon his bill in the court shall refund, and this as well as where it is legative in specie, as a horse, or a 1,000*l.* actually paid; for the legacies are not due till the debts be paid, and a legacy being paid remains as a legacy in the hands of a legatee after payment: and hence it is that a legacy is not attachable by foreign attachment, being it may work a wrong to the creditors, who are third persons, and can have no day in court in that suit to interplead. And for this reason if an infant executor assent, it is no good assent if there be not other assets for debts, which the common law provides for the security of creditors, much more shall this court provide for their security: but if after such assent, John Chamberlain the son had sold the leases to a third person *bona fide*, this had defeated the creditors, for he had a good title in law, and the purchaser should not be prejudiced by this trust for the creditors. And in this case it was also ruled, that if an executor make a devastavit, and die, his executor is liable to make good of the *quantum* of the devastavit, to the creditors, if he hath assets from the first executor.

Note.—A case was cited, wherein it appeared that the spiritual court insisted to have security to answer debts before the executor should pay the legacy, and a prohibition was prayed, but denied. And in this case because it appeared that the defendant Thomas Chamberlain was not born at the time of the decease of the said John Chamberlain the grandfather, nothing could vest in the said infant, and therefore the whole terms remained in the said defendant John Chamberlain; and for this reason the bill against the infant was dismissed.

Note.—This Hillary vacation, a little before Michaelmas term, the Lord Keeper declared it should be the rule, that a mortgagee forfeit should have interest for his interest, and should be only accountable for what profits he should receive, and not for what he might have received, unless there were fraud.

And note, that it was always the rule, that the mortgagee assigning, the assignee should have interest for the interest

then due, and never was contradicted but in Porter and Hobart's case in the time of the Lord Shaftsbury.

Note.—The Lord Keeper ruled that a plea of outlawry should be put in without oath, because of the averments of the identities of persons; and ruled that a plea of the privilege of Oxford should be put in without oath, between masters and Bush, 24th October last.

Plea of outlawry put in without oath. Identities.

DE TERMINO PASCHÆ.

Anno Regis 27 Car. II.

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IN CANCELLARIA.

Tanner alias Davis against Florence. April 19.

Sir Hugh Smith, grandfather to the defendant and H. S. 21 Jac. made a lease by indenture to Arthur Tanner, for ninety-nine years, if Arthur, Elizabeth, and Thomas their son, or either of them should so long live. In which was a covenant from him and his heirs, that if Thomas died, living Arthur and Elizabeth to make a new lease for years, if she and Mary, her daughter, should so long live, and tenders the 20^l. and surrenders the old lease, and dieth; the said Mary, administratrix of Arthur Tanner, being married to Davies, they sue the defendant for a new lease, charging that they had notice of the lease, 21 Jac. and covenant.

The defendant (viz.) Florence, makes title as jointress by conveyance made by the said Sir Hugh for valuable consideration, and of marriage to be had between Florence and William, son of Sir Hugh, of the manor of Ashborn, whereof the lands in question are parcel; in which there is a covenant against incumbrances, except leases or copies determinable on three lives, and on the said William and Florence, and the heirs of William by Florence. And the defendants deny notice of the lease set forth by the plaintiff, or of the covenant, but believe there was no such lease or covenant, because they have a counterpart of a lease of the same land to the same Arthur Tanner for ninety-nine years, and determinable on the same lives under the same rent. In which counterpart there is no such covenant to renew, and other counterpart the defendant never had.

This case was heard by the Master of the Rolls, who decreed the jointress, and the defendant Sir Hugh, heir to the intail, to make the lease. From which the defendants ap-

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The land bound by covenant.

pealed to the Lord Keeper, who heard the cause this 19th day of April, and affirmed the decree.

Exception of
leases for
three lives:
in one of
those there is
a covenant to
renew, pay-
ing 20l. It is
notice im-
plied, for
they ought to
see the cove-
nants.

For it was said, that it was a real covenant that bound the assignee at common law; which the Lord Keeper also affirmed. But was much denied by the counsel of the appellant, for the case of a covenant to repair is nothing like, for there it concerns the land during the old lease in being, this a new lease.

Lord Keeper. The exception of leases, *ut supra*, gave notice of former leases, and therefore you must take notice of the covenants in them.

It was answered thereto, that the exception is a generality, not particular of this lease, and is but for three lives; but this in effect is for four lives. And it might as well be good for five or six lives, or of the inheritance; and the course in purchasers is to take such general covenants; as in this case when a manor is sold, it is not usual to peruse all counter-parts; and many times they are wanting, and then it will make it very difficult to sell a manor in the west country. And if the appellants are purchasers without notice, the former leases may answer for that, &c. Lord Keeper decreed it.

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DE TERM. SANCT. TRIN.

Anno Regis 27 Car. II.

IN CANCELLARIA.

Anonymus. July 11.

Vender of
lands takes a
lease of them
at such a rent
with condi-
tion of re-en-
try, and gives
collateral se-
curity for the
payment of
the rent and
a re-entry.
Vender could
have no re-
lief ag't the
collateral se-
curity with-
out payment
of the ar-
rears.

The plaintiff, executor for children, was to purchase lands for them, and treated with the defendant, who affirmed that the lands were 250l. per annum value, and offered to take a lease at that rate for fourteen years; and did take it, and secured the rent by lands of lives worth 60l. per annum, but paid not the rent for five years. Whereupon a re-entry was made according to a condition in the lease. And the lands so entered into possessed for divers years. The vendor could have no relief, against the collateral security, unless payment were of the arrears of the 250l. per annum due before the re-entry as well as after the re-entry. The lands sold being worth but 160l. per annum.

Dowdsweel against Dowdsweel. Jnne 15.

Lord of a
manor cannot

The bill was to have certain surrenders made, but not engrossed, to be made up and engrossed. The plaintiff and

defendant were brothers; and in this case agreed by the Lord Keeper, that the father being lord of the manor could not declare the trusts of copyholds granted to his son, though he took the profits always by their consent. *Eadem die* decreed between Holford and

declare a trust of copyholds granted to his son.

Wright against Coxon. June 17.

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An account stated, and a balance thereon made whereby 3000*l.* was due to the defendant's testator. And the plaintiff recited the debt by the account, and covenanted to pay to the testator, and now sued to be relieved, supposing that 200*l.* to be mentioned in the account, and wherewith he was thereby charged, and that though he was once charged therewith, yet at the time of the account he was not, because when he came home he found that his servant had paid the 200*l.* to the defendant's testator, and that it was so entered in his account-book, but when he made the account he had not his books.

Plea of account stated, over-ruled though the defendant but an executor, and the account stated by the testator.

The defendant by way of plea saith, it was a stated account, and the balance thereof secured by writing under hand and seal; and that he being but an executor, knew not how to account; and set forth, that he believed that his testator upon his accounts delivered up his notes and vouchers, and that no stated account could stand in court, if this or that particular of it should be questioned.

The Lord Keeper overruled the plea, and cited Backwel and Squire's case: but to proceed no farther than answer, without leave of the court.

Plea over-ruled with this, that the plaintiff proceed no farther than answer without leave of the court. Heirs shall join in sale for debts.

Fowle against Green. June 17.

J. S. seised in fee deviseth the lands of his executors to sell, and pay debts. The heir shall be compelled to join in the sale. And the Lord Keeper said, it was so ruled in parliament.

Terrel against Page.

A devise of divers legacies in money; and then a devise followed of lands. All the rest and residue of my money, goods and chattels, and other estate whatsoever, I give to J. S. whom I make my executor, he having other lands. Decreed by the Lord Keeper that the other lands do pass.

All my estate in a will passeth a fee,

DE TERM. SANCT. MICH.

Anno Regis 27 Car. II.

IN CANCELLARIA.

Smith against Ashton. November 15.

Power not
pursued de-
creed.

J. S. seised of lands in two counties, conveyed part to the use of himself for life, with remainder, and power to charge the lands so conveyed, with 500*l.* by deed or will in writing under his hand and seal. This conveyance was voluntary, and without valuable consideration, and after by his last will in writing, not sealed, devised the 500*l.* to his younger children, in whose right the bill is exhibited against his son and heir to have the 500*l.*

Against which the counsel for the defendant insisted, that the law was against the plaintiff; and both parties claiming under a voluntary settlement, and the same consideration, (viz.) natural affection, therefore he that hath the law on his side ought not to be charged to the younger children.

The Lord Keeper took time to deliberate, and now decreed the 500*l.* though the will was not under seal, and the power not legally pursued. He cited Prince and Chandler's case, decreed by the Lord Egerton, where there was a power to make leases on a covenant to stand seised to uses, on consideration of natural affection, and the lease was for provision for younger children.

(264) Decreed good against the heir, for two reasons, 1st, for that the law was not then adjudged in Mildmay's case. 2d. Because the son did claim by the same conveyance by which the power was limited. So 17 June, 8 Car. the jointure of the countess of Oxford decreed good, where the power was not pursued; yet only part of her jointure depended on the question.

For he that reserveth such a power under circumstances, they are but cautions that another might not be imposed, or made without him. The substantial part is to do the thing, and therefore where it is clear and indubitable, the neglect of the circumstances shall not avoid the act in equity; possibly when from home or sick he remembered not the circumstance of his power; and the powers of this kind have a favourable construction in law, and not resembled to conditions, which are strictly expounded; for a power of this kind may be executed by part, and extinct in part, and stand for the rest; but a purchaser shall defend himself in such case, but with dif-

ference, though not executed according to the circumstances; for if he hath notice (*quare* if he meant of the original conveyance only, or of the ill executed estate) he purchaseth at his own peril.

Smith against Ashton. November 15.

Ralph, the grandfather of the defendant, an infant, had power by deed, or will under seal, to charge lands in Yorkshire, (which by the same conveyance he entailed on the heirs male) with moneys, not exceeding 500*l.* he sent notes in writing to J. S. to draw a conveyance to feoffees, but with blanks for their names, thereby to charge lands in Cheshire, called Wymondslly, with 1500*l.* portions for younger children; and if they sufficed not for 1500*l.* to charge the Yorkshire lands with what was deficient. Deeds were prepared of conveyances accordingly, and engrossed, but before they were sealed or names of feoffees inserted, he died. Richard, his son and heir, father of one of the defendants, upon marriage with Beatrix, and 500*l.* portion, settled the copyhold lands on Beatrix, with an entail to the heir's male of that marriage, and dies. The bill is by the younger children for their portions, having no other substance, nor *e contra*, Beatrix and her son any at present, if the plaintiff prevail.

Power not observed in circumstance decreed.

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The bill charged the notes in writing to be the last will of Ralph, the grandfather, but no mention in the notes of any reference of a will, but a conveyance, and a conveyance prepared, but no will.

On the first hearing direction was given for a trial at law, whether the notes were part of the last will of Ralph, and a verdict passed, that they were.

The cause coming again to be heard, the chancellor took time to advise, and now decreed the Cheshire lands to be sold for payment of the portions, and immediate possession thereof to the younger children, and the infant to be charged out of the Yorkshire lands so far as 500*l.* if the Cheshire lands sufficed not by sale.

1. Note. This was decreed, though the power of charging, was not observed in the circumstance.

2. Note. A will, and no writing, mentions it to be so.

Anonymus. November 25.

A. executor temporary, and after B. to be executor. A. proved the will, his executorship ceased. B. might sue without other probate of the will by him, by the opinion of the Lord Keeper. And the cause proceeded accordingly to a decree of an account.

Executor temporary.

Bullock against Knight.

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Bullock, for a marriage to be had between Henry, his son, and Bridget, the daughter of Knight; and being possessed of a lease of one thousand years, articulated to settle those lands in consideration thereof, to the use and in trust for himself till the marriage, and after the marriage to the use of himself for life, and after his death to Henry for his life, and after to the use of Bridget for her life, and after their deaths to the use of the issue of their two bodies to be begotten, according to the descent of lands so entailed. The marriage being had, the lease was assigned to those uses. Then the father being dead, Henry, the husband, granted his interest over and dieth. Bridget surviveth and dieth. The defendant takes administration of Bridget. Bullock, the father, was dead at such a time as Henry made his grant. The assignee sueth for the benefit of the trust. And the dispute on plea and demurrer was, to which the benefit of the trust belonged? There is no issue living; but as I take it there was issue born, but dead. And the plaintiff made title as administrator also to the issue.

Trust of a
term for a
feme covert.

First. Sir John King for the plaintiff objected, that the trust of a term limited to a feme covert was disposible by the husband, and did bind the wife for the trust; for the trust of a term shall be of the same nature as the term is.

Lord Keeper. I should not doubt if a feme have the trust of a term for years, and marrieth, but to decree it to the alienage of the husband (*sed quære* if to the alienage: but it seems it must be to execute the decree to the husband, and then the husband may alien; but the Lord Keeper said as before,) when a term is settled for the maintenance and jointure of the wife, the husband shall never bind the wife by his alienation.

Trust of a
term to issue.

2dly. It was debated, whether the trust limited to the issue were here in nature of a limitation, or by way of purchase, so as the issue born had then an interest vested in him? For the wife's administrator could have no title.

It was pressed to be a limitation, not a purchase, the rather for these words, in course of descent.

Lord Keeper. An use to the husband and wife, and after to their issue, they then having none, is all one as if limited to them and the heirs of their bodies; and the issue takes nothing as a purchaser.

3dly. Yet then it was objected by Sir John King, that the husband may alien his part; but it was not to my intention fully enough pressed that here the articles were made before the marriage, and consequently they took by divided moieties.

The Lord Keeper ruled the plea good.

Jefferson against Dawson.

On a Plea.

Purchaser of lands incumbered with a statute, purchaseth in a precedent statute, having no notice of the first statute. Purchase protected.

Lord Keeper. If he had notice of the second statute before he was dipped in the purchase, he shall defend himself by the first statute, whether the same were paid off or no; if he can at law do it, equity shall not help him.

Anonymus.

Prat devised his houses in Sepulchres parish to St. John's college, he being tenant *in capite*, and the corporation misnamed, which was a void devise as to pass the lands, and so on former proceedings certified by the opinion of the judges. Devise void by misnomer of corporation, supplied in equity as a good appointment of a charitable use.

The Lord Keeper notwithstanding decreed it a good appointment for a charitable use, within the stat. of 43 Eliz.

But then it was objected, that if so, yet then the process and method appointed by the statute ought to be held, viz. a commission and inquisition, and decree by commissioners, and so to come at last to a final decree by the Lord Chancellor or Lord Keeper, but not to sue by original bill, as in this case.

But the Lord Keeper decreed the charity, though before the statute no such decree could have been made.

Then the defendants claiming not only as heirs at law, but by a title paramount the devisor, it was decreed against him as to any title under the devisor, but not against the other title.

But it was farther decreed, that at any trial at law he should not insist or give in evidence the invalidity of the devise.

The prosecutors for the charity brought an action at law in the Common Pleas, where they made title by the devise; the council for the defendant not being informed before of the decree, insisted that the decree was void. Whereupon the plaintiff read the decree, and the plaintiff was non-suited, and then moved the court of chancery for a commitment of the defendant and establishment of the possession, which was ordered, *nisi causa*. Relief upon the statute of charitable uses by original bill. Referred to law, and ordered, that the defendant do not insist on a title set aside by the decree. He does insist on it.

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For cause it was shown, that the trial was voluntary, and the court had ordered no trial, and the defendant's counsel were not apprised that the defendants had been served with the decree, and were willing to go to a new trial on the other title, and prayed farther time to show cause because of the shortness of the time given to show cause.

Lord Keeper. You labour to get an appeal to the king, and so to delay; let the order stand.

Chifford against Asbley and others.

Fine and
non-claim
bars a trust.

George Low, the father, being indebted 3000*l.* for profits of lands which he received, by his will devised, that if his personal estate fell short, that his own lands in the counties of Wilts, Hereford and Lincoln, should be liable to make satisfaction. There was a decree against George Low the son for satisfaction out of the lands, and he being dead, a subpœna in the nature of a *scire facias* is brought against the defendant as tenant. And all the defendants but Asbley, as tenants of the lands to George Low, plead *inter alia*, that they are several purchasers for a valuable consideration by fine with proclamation, after a decree and non-claim, without notice. And whether this was a good bar was the question, and long debated.

Jones 14 Car.

Entry on the
land by a
cestui que
trust is no
sufficient
claim.

Lord Keeper. 1. A fine with proclamation and non-claim will bar a trust, and so it was resolved in the exchequer.

2. And an entry on the land by a *cestui que trust*, is no sufficient claim, but it must be by subpœna.

3. But there is a decree which is more than a trust. And put case that a man have a judgment on debt at the common law, on which he may have an *elegit*. The defendant after judgment aliens the lands by fine and proclamation, and five years pass; the plaintiff may have a *scire facias* and *elegit*; and why not? So here I answer, that in case of a statute or judgment, the plaintiff or cognizee had no interest in the land; for if he release all his right to the land, yet he may sue execution on the land.

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Much was said on the other side touching the inconvenience and ill consequence; on the one hand how dangerous it would be for purchasers, and how much the statute of fines would be weakened; on the other side, how decrees would be weakened.

The Lord Keeper took time to advise.

But Asbley's plea was allowed, because as to the lands, viz. Fisherton Anger which he claimed, George Low party to the fine was but tenant in tail, the remainder over to his brother, under whom Asbley claimed by fine without notice of the trust or decree.

Man against Cob.

Tenure and
seisin of rent
admitted at a
trial.

The plaintiff, lord of the manor of Finchley pretends himself lord, and seised of rents of the defendants as tenants of the freehold. A trial directed and found for the plaintiff, and decreed that the tenure and seisin be admitted without farther trial.

Lord Keeper. Tenants use their landlord's badly now.

Anonymous.

The inhabitants of Sutton Cofield were incorporated by H. III. and the manor and park granted to them in fee, by the name of the warden and assistants, and the grant was made to them ; and it appeared by the grant, that the same was for the benefit of the inhabitants for ease of taxes, and relief of the poor.

Grant to the warden and assistants for benefit of the inhabitants. They cannot let without the inhabitants.

A suit was in the star chamber touching misemployment and enclosing the lands, whereby the inhabitants were prejudiced ; and there decreed that no farther enclosure should be made without consent of the major part of the inhabitants.

In King Charles the First's time some of the principal of the inhabitants, Mr. Pudsey and others took a new charter, leaving out the inhabitants ; and now the warden and twenty-three more made leases, and inclosures without consent of the major part. And the plaintiff, an inhabitant, on behalf of himself and the rest of the inhabitants do complain.

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And the Lord Keeper decreed against the new leases and inclosures, and that no such should be without consent of the major part. And on rehearing confirmed this decree ; for though the administration was in the twenty-four, yet the benefit was for the inhabitants in general ; but it was pressed much that the twenty-four were the corporation, and the interest in them, and they might alien the estate, and *a fortiori* lease and inclose ; and it would breed contention and confusion if that the multitude must intermeddle.

Anonymous. December 14.

The Lord Keeper was moved touching a statute lost to have it certified ; and two precedents were shown.

Statute lost, not to be helped by motion, but bill ag't all parties.

Lord Keeper. They are precedents not to be followed, and I will never do it. Exhibit your bill against all that are concerned in the land, and justice shall be done you.

DE TERM. SANCT. HILL.

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Anno Regis 27 & 28 Car. II.

IN CANCELLARIA.

Cornish against Mew. January 28.

Cornish seized in fee devised lands to A. for life, remain- to B. in fee. The lands were before the devise mortga- in fee for 100l. and she made A. executor, and left assets

Ant. 224. Difference between the

heir of a mortgagors being relieved upon the personal assets, and a devisee in such case. Tenant for life decreed one third and he in remainder two thirds, to redeem.

A jointress paying off a

(272)
mortgage decreed to hold over till she be satisfied.

enough to pay the debts which B. in remainder prayed it might go to the payment of the mortgage, as in case of the heir, who should be relieved upon the personal estate in such case.

But the court took a difference ; there indeed the heir shall be relieved, but not a devisee ; and decreed tenant for life should be decreed one third, and he in remainder two thirds, to redeem.

The same day another case, where a jointress was of land mortgaged, between Bertue and Stile, decreed that the jointress paying the mortgage, she should hold over till she and her executor should be repaid with interest.

Brown against Vermuden. February.

Where a parish is sued, and four named to defend, and a decree against them, one who claims under none of the four contests the decree.

Brown, vicar of Worselworth, sued a *scire facias* and by *subpoena* to have execution of a decree had by and on the behalf of one Carrier, his predecessor for the tenth dick of lead-ore in the parish, at the charge and labour of the miners there (viz.) the vicar to pay one penny a dick. Carrier his predecessor, sued divers miners there, grounding his suit by prescription. Four persons were named by the miners to defend the suit for them, and a decree passed against the four, for Carrier and his successors, that the defendants and all the miners should pay. Vermuden, who owned and wrought a mine there, being served, appeared and insisted that he is not bound by the decree, for that he was not party or privy, nor claimed under any who was ; and if he should be bound, then the parson ought to be bound, if the decree had been against the parson, which could not ; because the parson nor ordinary were no parties, and the defendant could have no bill of review of it if it be erroneous, and therefore ought not to be bound.

Where a parish is sued, four moved to defend, and a decree agst them, one who claims under none of the four contests the decree.

The Lord Chancellor. 1. If the defendant should not be bound, suits of this nature, as in case of enclosures, suit against the inhabitants for suit to a mill, and the like, would be infinite, and impossible to be ended. And declared, that the defendant, though no party or privy, yet he may have a bill of review, because he is grieved by the decree.

2dly. The defendant insisted on the jurisdiction of the dutchy court, the parish being part of the dutchy, and the king had *cap.* and *lat.* as in right of a dutchy, and a court of revenue.

The Chancellor. It is within the county palatine ; this court may hold plea of lands in the dutchy.

3dly. The court who made the decree held the 1st. per dick too little, and ordered a commission to settle some more reasonable recompense to the miners, which never was executed. *Non allocatur.*

4. Sir John Heath was tenant in common with Vermuden, (273) who ought not to be prosecuted alone. But the defendant notwithstanding was ruled to perfect his answer to the interrogatories.

The Lord Chancellor. The question is, whether the decree while it stands should be obeyed, not whether it be well made ?

..... against Hawkes. February 11.

Hawkes in his purchase had notice of the plaintiff's annuity, for it was excepted in his deed of purchase, which contained part of the lands charged, and divers other lands. After Hawkes sold the other lands not charged, and also some few acres of the lands charged by general words, and desired the plaintiff and her husband to join in a fine to the person who bought them, and was assured by Hawkes that the same would not prejudice her in the lands settled on her : but this was proved by one witness only, and his depositions uncertain as to the particulars. Relief for an annuity ag't a purchaser.

Also it was proved, that another person had also bought, and was in possession of three acres of land charged, and was no party to the bill ; and that no relief ought to be in equity, because the extinguishment of the rent being a rent charge was by the plaintiff's own act by a fine. And however Hawkes could not be charged, there being no apportionment to be made, the tenant of the three acres being no party to the bill. Rent charge not extinguished.

The Lord Chancellor. Here was no consideration for the rent, and no agreement to extinguish it ; and when the land was sold, it was sold for 800*l*. of which 700*l*. was paid to Hawkes. The widow was circumvented, and decreed relief against Hawkes.

Richardson against Louther. February 12.

Certain exhibits of writings were given in it at a commission for examination of witnesses. The defendant suggested that the exhibits were altered and interlined since the commission executed, and prayed a commission to examine that point. Alteration of exhibits after commission.

Objection. When the party hath a commissioner present, (274) he can never examine new interrogatories by commission. When the party hath a commissioner

Resp. True as to the merits. But this hath happened

present, he can never examine new interrogatories by commission as to the merits. since, and not examined to by the commissioner, nor being then in being. Object. How could the defendant know this, but by discovery of his commissioner, who ought not to discover the examination?

But yet the Lord Chancellor ordered a commission.

Taylor against Debar, &c. February 34.

A bad title sold with covenant for further assurance, and afterwards the vender purchaseth the good title. A purchaser of the crown lands in the time of the late wars, sells part to the plaintiff, and covenants to make further assurance. He on the king's restitution for 300*l.* had a lease for years made to him under the king's title. The decree was, he should assign his term in the part he sold.

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DE TERMINO PASCHÆ.

Anno Regis 28 Car. II.

IN CANCELLARIA.

Anonymus. April 30.

Proof of a creditors debt disallowed by commissioners, the court will hear the proof. A creditor offered proof of his debt to the commissioners of bankrupt, which they disallowed. Distribution was not yet made. It was alleged that the proof was sufficient, and moved that the Lord Chancellor would be attended by both sides to hear and give order therein. The Lord Chancellor. Why should I not leave it to the course the statute hath provided? If it be granted in one, it will be asked on all cases. Yet at last it was ordered.

Whitton against Lloyd. May 1.

Debts before legacies where lands are devised. A. deviseth his lands to his executors towards payment of his debts and legacies. The Lord Chancellor. Debts must be paid before legacies. And decreed his debts to be fully paid before his legacies, and took a difference between such appointment made by conveyance, and by will.

Waller against Dalt. May 1.

A young gentleman takes up wares, &c. and relieved. Waller, a young gentleman, and two others, employed one Willis to borrow 500*l.* Willis employed Wiltshire, who spoke to Dalt, a silkman, and bought of him silks for 500*l.* The plaintiff gave bond and judgment for the money. Wilt-

shire sold the silks for 250*l.* and kept 50*l.* for his and Willis' pains, and paid 200*l.* to the plaintiff. The defendant never treated with the plaintiff. And denied on oath that he ever treated about the loan of money, and deposed the silks to be of 500*l.* value or thereabouts, but proof to the contrary.

Decreed only 200*l.* and interest (*Quære* for the interest) and relief against the defendant *quoad resid.*

DE TERM. SANC. TRIN.

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Anno Regis 28 Car II.

IN CANCELLARIA.

Bulstrode against Lechmore. June 4.

The bill was to discover an ancient deed of intail supposed to be in the defendant's hands, and that he had perused it, and that in discourse he had acknowledged such deed and other like charges.

Engagement of silence by a counsellor, he shall not be put to answer.

The defendant saith by plea, that he was a counsellor with A. B. that on a reference between the parties, it was agreed that nothing that passed then, should be made use of on either side, or be disclosed.

The Lord Chancellor ordered that what the defendant knew only as counsellor, or under such contract of silence, he should not be put to answer.

Moor, against Blagrove. June 9.

A legatee of a term sued for it, but made not the executor party, and therefore the bill was not good though the executor to the legacy was alleged in the bill to consent by the plaintiff assignee of the legacy.

Legatee of a term sues, and the executor no party, not good, tho' charged

Salisbury against Baggot. June 23.

Among many other questions, which arose in the case, some were about the operation of a fine with proclamation and nonclaim thereon, of which the Lord Chancellor having heard the cause several days, took time to advise, and now declared his opinion at large.

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that the executor had assented.
Sir William Jones' Rep. 416.

The bill was to have articles made on good and valuable consideration, sixty years before decreed, by which the lands in question were to be settled on A. the father for life, remainder in tail to him whose son and heir the plaintiff is.

The defendants insisted on a fine and nonclaim, which the plaintiff would *inter alia* avoid by infancy of himself and of non-claim.

his father, and of entry made by himself within five years after the death of A. who was tenant for life.

The Lord Chancellor in several other points touching notice, &c. was of opinion for the plaintiff, but dismissed the bill on consideration of the fine.

Fine and non-claim bars equity and trusts, i. e. where the lands only are charged. But where the lands only are charged in respect of the person it bars not.

That fine can never bar the equity or trust which it creates. Claim of an equity to avoid fine can be no otherwise by subpoena.

1. That a fine and nonclaim bars all trusts and equity, and so it was resolved by all the judges between Cary and Sir Thomas Thynn, where the equity was of practice in gaining a conveyance of lands, and since resolved in the exchequer, where a trust was barred, else no man could know when he was sure of an inheritance : but this is on two differences :

1st. Where the equity chargeth the lands as in the aforesaid cases, there the fine bars ; but where it chargeth the son in respect of the lands it doth not bar, as in the Lord Knowl's case, wherein a fine and non-claim barred not.

2ndly. If the equity or trust be created by the fine, that fine shall never bar the equity which it created. But the objection that there is a claim within the five years of the death of the tenant for life, by the issue in tail, helps not, in respect of the manner of claim ; for the claim is to be of an equity which can be made no other way but by subpoena. In cases of lawful entry or action equity makes not an entry lawful. Entry of an issue after discontinuance is no claim, but it must be by *formedon* ; the statute hath taken away the claim at common law *sub pede finis*.

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2. The claim in equity in this case is to have an assurance or conveyance made, which the father of the plaintiff might have sued for, being long ago, and that being vested in the father, his nonclaim thereto shall bar his son the plaintiff. But if the conveyance had been made, then the entry of the plaintiff had been a good claim to avoid the fine, for no man shall be enforced to take advantage of a forfeiture. It is time enough for him in remainder to enter after the death of tenant for life. But here is no title to the lands, but an equity to have the conveyance of the lands settled on a lease for life, the remainder in tail.

Quære. If the party, who should make the settlement, should die without heir, or the like ? And quære, if one be entitled to have the land conveyed, have not a title to the land in equity ?

Clotworthy against Mellish. Junc.

A plea and three insufficient answers, whether to be examined on interrogatories.

Plea to part, and demurred to part ; the plea overruled. Then the defendant answered, and that being insufficient he put in another answer, and that reported insufficient, he put in a fourth answer : if the first be accounted one.

The Lord Chancellor did not commit him to be examined on interrogatories.

Cavendish against

Matters in difference referred by consent and order of the court to Mr. Birch and two others, or any two of them. Two made the award, and now exceptions were taken to the award on the one side, and the other side moved it might be decreed.

The Lord Chancellor. If the parties without the court refer the differences, they chose their own judges; and this court relieveth not against the award, unless it be in a case of corruption, exceeding authority, or the like. But when a reference by consent and order of court, if it appear unequitable, this court will not decree it. And accordingly in this cause set aside the award and bond of submission. The reason was, because it concerned an infant, to whom 450*l.* was awarded; and that bond should be given by the guardian, that the infant should at his full age convey the lands in question, which is not reasonable, for he may die; or if he live to age, refuse to convey; so it is not natural.

The Lord Chancellor also said, he would never decree an award which should bind an infant.

Popham against Sir John Hobert, Nephew of Sir John Hobert, deceased.

The case was, Sir John Hobert had two daughters, Dorothy (married in his life time to Sir John Hele, whose grandchild and heir the plaintiff married) and Philippa. And having such issue, settled divers lands in Norfolk on trust in fee, that they and the survivor of them within two years after his decease should sell, as they should think fit, and that the moneys raised by sale, and the profits in the mean time should be employed towards payment of his debts and legacies that should be left unpaid by his executors; and the overplus, after such debts and legacies paid, to such persons as he should appoint by his will; and in default of such appointment, to Philippa and her executors, which he after by his will confirmed, and died in 1647.

Philippa married the defendant in 1647, and after her father's death had issue by him, and died, and then the issue of Philippa also died an infant without issue.

The defendant took administration to his wife. The trustees had paid off some debts and sold some lands; some lands remained unsold, and some debts unpaid. The defendant obtained from the trustees a conveyance of the lands because the surplussage of the money of the lands sold was to go to his wife, her executors and administrators.

The plaintiff and his wife as heirs to the testator, and Philippa the wife prayed an account, and to have the lands unsold. To which the defendant pleaded the matter.

No relief against an award made without order of court unless for corruption.

Exceeding authority, &c. for there the parties chose their own judges; but if by consent [280]

and order of court it shall be set aside if unequitable. Award that he shall procure the infant to convey when at age, set aside because unreasonable. The court will decree no award to bind an infant.

Lands settled in fee on trust, to sell so much as the trustees should think fit for payment of debts and legacies, and the overplus to his daughters and her executors.

1. Whether the trustees can sell more than is sufficient.

2. The daughter being dead without issue, whether the lands belong to her administrator or her heir.

The Lord Chancellor ordered the matter to be put in by way of answer.

Reasons against the plea were urged.

Power to sell lands subject to the rules and laws of equity.

1. The lands are not appointed to be sold absolutely, but to be sold as the executors should think fit, which is all one as if it had been sold, if they find occasion for payment of debts and legacies. But in such case they have not a pure and absolute power and merely arbitrary, but subject to the rules and laws of equity; for in case the estate personal would suffice to pay the debts, they may not sell the lands and pay the debts with that money, and keep the personal estate to themselves.

2dly. And as they are restrained from selling in case the personal estate can pay all, so if it will pay part proportionably according to reasonable circumstances, in that case they may sell, and not otherwise. *Quære* therefore if the executors should not be made parties.

3dly. When Philippa the wife died, the surplus or necessary sale will belong to the administrators; but it did not lie in the power and election of the husband, her administrator or trustees to sell without necessity, and thereby to give in effect the value of the lands, or the lands themselves from his child that survived her, and was heir to the husband, and thereby disinherited the child, and in effect entitled the administrator to the lands by way of bargain.

4thly. Put case the husband had died before the wife, and a collateral kinsman had taken administration to the wife dying after her husband, he might as well have done it as now the husband has done, he could not with any colour, have had the lands, and the husband hath no other title, but what such stranger-should have (*viz.*) as administrator, not as husband.

5thly. No administrator in such case is to be preferred before an heir. The heir shall enforce the administrator to preserve the inheritance from sale by the personal estate to pay debts.

Objection. The name is preserved, she marrying a Hobert.

Answer. The marriage was two years after the testator's death, and therefore could be no consideration of this bequest; for she might have married any other person, and such husband should have as much right as Sir John Hobert.

The title that the son had while he lived, descends to the plaintiff as his heir, and did so descend before the transaction between the defendant and the trustees, and the trustees might not make then whom they pleased heir to the lands.

The husband without a fine by the wife, could not bind the wife and her heirs to take from her the power to clear the estate by payment of the debts, nor consequently to bar her heir thereof.

Brown against Vermuden.

Brown, parson of Worselworth, exhibited a bill against Tithe of lead Vermuden to have performance of a decree obtained against ore. certain persons, workers and owners of lead mines in Derbyshire, whereby a certain manner of tithing of lead ore was decreed, not only against the particular persons named defendants, but all other owners and workers.

Vermuden pleaded *inter alia*, that he was a stranger, and claimed not under any party or privy to the bill, and therefore insisted he ought not to be prosecuted by a bill not grounded on the fact and title, but on the decree in the nature of a *scire facias*.

This plea was formerly overruled by the L. Chancellor, vide fol. 272. But a commission granted to examine the quantity and value of the ore, and the plaintiff's title, if parson, &c. The six clerks appointed time and place, but the defendant's witnesses were so aged, that they could not come to the place, and therefore a new commission prayed.

Lord Chancellor. The time and place is only for the first Commission-meeting of the commissioners; but after they may adjourn ers adjourn. to another time or another place.

The LORD KEEPER FINCH.

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Giles Thornbrough, clerk, and Jane his wife, daughter and heir of Lawrence Clifton gent. plaintiffs, John Baker, son and heir of James Baker, and John Nichols Esquire, and Sarah his wife, administratrix of James Baker, defendants.
July 10.

The plaintiff's bill being, that the said Lawrence Clifton by indentures of lease and release between him and the said James Baker, bearing date the 20th and 21st of October, 1656, in consideration of 500*l.* paid to him by the said James Baker, did convey to the said James Baker and his heirs several lands in Stoak in the county of Surry; and by another indenture, executed at the same time between the same parties, it was agreed between them, that if the said Lawrence Clifton should during his life pay to the said James Baker, his heirs, executors, administrators or assigns 30*l.* yearly, at Lady-day and Michaelmas, or within thirty days after, by equal portions, and if the heirs of the said Lawrence should

within six months after the death of the said Lawrence pay to the said James Baker, his heirs, executors, administrators or assigns, the sum of 500*l.* with interest since the paying of the last 15*l.* then the lease and release should cease and be void ; and about one year after the said Lawrence Clifton died, leaving the said Jane, his only daughter and heir. And by another indenture bearing date the 25th of May, 1658, made between the now plaintiff and the said James Baker, did covenant with the plaintiff, that if they or either of them should pay to the said James Baker, his heirs, executors, administrators or assigns the sum of 20*l.* only on the 20th of October then next following, and the sum of 530*l.* on the 20th of October, 1659, that then the said indenture of lease and release should be void. And the said James Baker died about May, 1659, and the premises being forfeited, they descended to the said defendant, John Baker, son and heir to the said James ; and the defendant Sarah, the relict of the said James Baker, having administered of his estate granted to her, her said husband John Nichols, and she does pretend to the said mortgage, and the plaintiff praying a reconveyance on payment of what was due, the defendant, John Baker, by his answer confessing the mortgage and agreement aforesaid, and that the mortgage being forfeited descended upon him as heir to his father, and submitted to reconvey the premises on payment of principal, interest and costs to him, the defendant, and John Nichols and his wife confessing the said mortgage, and insisting that the said Sarah was administratrix to her former husband, and thereby entitled to the said mortgage money and interest, although he hath other assets of her husband's estate, with a considerable overplus.

It was upon the hearing of the cause the 11th of February in the twenty-third year of his now majesty's reign, decreed by the Master of the Rolls, that upon payment of principal, interest and costs, the defendant John Baker should reconvey the premises. And it was then farther ordered, that the party should attend the right honourable the Lord Keeper of the great seal of England for his lordship's directions, whether the principal and interest should be paid to the defendant John Baker the heir, or to the defendant Sarah, the relict and administratrix of the said James Baker ; since which the said principal and interest having been paid by the plaintiff, and a reconveyance made unto them, but the question between the heir and the administratrix being not settled, now upon hearing and full debating of the matter this present day by counsel learned, as well for the heir as the administratrix, whether the said principal money and interest doth belong,

and ought to be paid to the heir or administratrix, and the former precedents being produced, the Lord Keeper having been attended with the said cause and precedents, and having taken time to consider thereupon, did now declare, that the mortgage ought to go to the other defendant John Nichols and his wife, the administratrix of James Baker, and not to John Baker son and heir of the said James Baker; because the reason of the common law in these cases ought as near as may be to be followed in equity. Now by the common law, if the conditions or defeazance of a mortgage of inheritance be so penned, that no mention is made either of heirs or executors to whom the money should be paid, in that case the money ought to be paid to the executrix, in regard that the money came first out of the personal estate, and therefore usually returns thither again; but if the defeazance appoints the money to be paid either to heirs or executors disjunctively, there by the common law if the mortgagor pay the money precisely at the day, he may elect to pay it either to the heirs or executors, as he pleaseth: but where the precise day is past, and the mortgage forfeited, all election is gone in law, for in law there is no redemption. Then when the case is reduced to an equity of redemption, that redemption is not to be upon payment to the heirs or executors of the mortgagee at the election of the mortgagor, for it were against equity to revive that election, for then the mortgagor might defer the payment as long as he pleaseth, and at last for a composition by payment of the money to that hand which will use him best, much less can the court elect or direct the payment where they please, for a power so arbitrary might be attended with many inconveniences throughout. Therefore to have a certain rule in these cases, and a better cannot be chose than to come as near unto the rule and reason of the common law as may be. Now the law always gives the money to the executor where no person is named, and where the election to pay to either heir or executor is gone and forfeited in law, it is all one in equity as if either heir or executor were named, and then equity ought to follow the law and give it to the executor, for in natural justice and equity the principal right of the mortgagee is to the money, and his right of the land is only as a security for the money; wherefore, when the security descends to the heir of the mortgagee, attended with an equity of redemption, as soon as the mortgagor pays the money the lands belong to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executors or administrators of the mortgagee. And for this reason a mortgage of an inheritance to a citizen of London hath been held to be part of his personal estate, and divided according to custom. And though

Equitas sequitur legem.

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Where the mortgage money shall be paid to the heir or the executor, in law or equity. Elective.

The nature of a mortgage.

Mortgage of an inheritance to a citizen of London part of his personal estate.

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it may seem hard that the heir should part the land, and be decreed to make a recompense without having the money which comes in lieu of the land, yet it will not seem so to them who consider that the land was never more than a security, and that after payment of the money the law keeps a trust for the mortgage, which the heir of the mortgagee is bound to execute; and his lordship declared that the right to a sum of money, which is a personal duty, ought always to be certain, and not to be variable upon circumstances. Wherefore his lordship did not think it material that the administratrix in this case had assets without this money, for assets or not assets is not the measure of justice to executor or administrator, but serves only as a pretence to favour the heir, who either ought to have the money if there be no assets, or not to have it though there be assets. And for the same reason his lordship did not think it material that there wanted circumstances of a personal covenant from the mortgagor to pay the money, for though the case of the administratrix of the mortgagee had been stronger with it, yet it is strong enough without it. His Lordship declared that he had considered the various precedents in this case which had been urged, whereof not one did come to the very point, there being a great difference between a mortgage and an absolute conveyance with a collateral agreement to reconvey upon repayment of the purchase money, the other late precedents which made for the heir being contrary to the more ancient precedents of this court, and to some modern precedents also, which seemed to his lordship of more weight, his lordship being of opinion that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagee in his life-time, or by his last will do otherwise declare and dispose of the same. Wherefore, and upon the whole matter, his lordship having fully weighed the precedents, and what was said on either side, doth order and decree that the mortgage money and interest shall be paid unto the said John Nichols and his wife, and kept by them, and that what security hath been given by either of them concerning the disposing of the said moneys and interest, or the abiding the order of this court, as to the payment of the said money and interest, be delivered up to them and cancelled.

Difference between mortgage, and an absolute conveyance with a collateral agreement to reconvey.

Mortgages looked upon as part of the personal estate.

DE TERM. SANCT. MICH.

Anno Regis 28 Car. II.

IN CANCELLARIA.

Bisco against the Earl of Banbury, Son and Heir of Nicholas Earl of Banbury. October 24.

On hearing the cause by appeal from a decree formerly pronounced by the Lord Chancellor. The case was,

Edward Lord Vaux, father of Nicholas Earl of Banbury, on the marriage of Nicholas his son Earl of Banbury, and Elizabeth wife of the said Lord Vaux, father and mother of Nicholas, with Isabel daughter of the Lord Mountjoy, in consideration of the said marriage, and 8,000*l.* portion, *inter alia*, settled the manors of great and little Harrowden to the use of Nicholas and Isabella for their lives, the remainder to the Earl of Salisbury, and others, the survivors of them for ninety nine years, in trust, to raise 6,000*l.* for portions for the daughters of the said marriage, the remainder to the heirs male of the said Nicholas by Isabel, with remainder over, the remainder to the Lord Vaux in fee.

A trust for raising a sum of money on a term which happens to be void, transferred by another term, whereon the grantor had power to charge it.

29 January, 1651, Nicholas and Isabel, in consideration of their marriage formerly had, and a portion of money paid, and natural affection, convey the said manors to Russel, and Rich and Lake, to the use of Nicholas for ninety-nine years, if he lived so long, the remainder to Isabel for her life, the remainder to Russel, Rich and Lake for the life of Nicholas to preserve the contingent remainders after limited, the remainder to the first, second, &c. and other sons of Nicholas by Isabel, and the heirs male of their bodies, the remainder to Russel, Rich and Lake for ninety-nine years, with remainder over. The trust of this term, to the use of such persons to whom the sum of 6,000*l.* as the said Isabel according to a proviso should appoint.

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The proviso was, that if Nicholas or his heirs, or other person, owner (of the reversion on the ninety-nine years) should pay such sum, not exceeding 6,000*l.* as Isabel by her last will in writing should appoint, whether she was covert or sole, then the lease to cease, and until such payment to the use of those persons, &c.

Proviso, that Nicholas with consent of Isabel, Russel, Rich and Lake, in writing expressed, may revoke all and every the said uses, and limit new.

14 January, 1652. The lady according to that proviso revokes all the uses in the deed 20th January, 1651, and de-

clares that a fine and recovery was to be had to the use of Russel, Rich and Lake, and their heirs, in trust, that they execute a deed prepared to be dated 28th February instant, for securing of 2,000*l.* to Sir Thomas Hewet of part, and to stand seised of the residue to the uses in the covenant of the 29th January, 1651, and then to convey the premises accordingly.

18 February, 1652. Part of the premises are demised by Russel, Rich and Lake to Sir Thomas Hewet for five hundred years for securing the 2,000*l.* with power of redemption on payment.

In this conveyance Nicholas, Isabel, the Lord Vaux father of Nicholas, and divers other persons join. And in this indenture it is recited, that the said Nicholas according to power in a deed 28th January, 1651, he the said Nicholas by indenture dated 24th February, with consent had revoked every the uses in the indenture, 20th January, 1651, and declared the use thereof to Russel, Rich and Lake, and their heirs, to the intent to join in and execute the security therein mentioned, and afterwards to convey to the uses in the tripartite deed mentioned, that is, the deed 29th January, 1651, as by the said indenture of revocation appeareth.

[289] 13 January, 1651. There are divers other recitals, and *inter alia*, a lease of the said manors made 13th February 1651, to Engrim and others for years, determinable on the death of Nicholas Earl of Banbury. And it is agreed that till default of payment of the 2,000*l.* to Sir Thomas Hewet, the profits of the same should be disposed according to the trust in that indenture (*viz.*) for the said Nicholas, &c.

Anno 1653. Nicholas, &c. conveys the said manors to the uses mentioned *supra* (*viz.*) to the use of Nicholas for life, the remainder to Isabel for life, the remainder to Russel, Rich and Lake for the life of Nicholas to preserve contingent remainders to first, second, third, &c. sons of Nicholas, &c. *ut supra*, the remainder to Russel, Rich and Lake for ninety-nine years, then next, and that Russel, Rich and Lake during the said term should employ the rents and profits of the premises to the raising of such sums of money as Isabel by will in writing, or other writing should appoint, and at such time, and in such manner, and to such persons *ut supra*, and in default of payment at such times the persons to whom, &c. to take and receive the profits *prout supra*.

Proviso of revocation *in terminis prout supra*.

The Lady Isabel by will appoints payment of the 6,000*l.* to the plaintiffs, and others, and she dieth. Nicholas on treaty of marriage to be had with the countess and 4,000*l.* portion, covenants to levy a fine of the said manors to the use of

Nicholas for life, the remainder to the defendant for her life for her jointure, the remainder over in tail.

In this assurance are the incumbrances excepted of the ninety-nine years, and 6,000*l.* daughter's portions in the deed 1649, and the mortgage made to Sir Thomas Hewet for 2,000*l.*

The bill is now to have the other sum of 6,000*l.* limited by the deed 1653, and appointment thereof by Isabel Harvey, surviving trustee of the first ninety-nine years, and the lessees by the deed 1653, for ninety-nine years, and the lady jointress are parties.

The cause was formerly heard, and a decree pronounced by the Lord Chancellor for the plaintiffs, and now confirmed by him with great earnestness, and not without some reflection on the defendants' counsel, as if the fee was more regarded than the justice of the cause.

The points moved were, that the trust to raise the 6,000*l.* in question was appointed to be raised out of an estate for ninety-nine years, which falls out to be a void estate; for it is for the same term when the former estate for ninety-nine years to the Earl of Salisbury did commence (*viz.*) after the death of Nicholas and Isabel, which now in event of the cause (Nicholas having no issue by Isabel) falls out to have the same beginning and ending with the former; but two terms at one time cannot be in possession for the same time; and the limitation is not that the said manors shall be to those uses, but the trust seems to be restrained to the estate of ninety-nine years limited by the deed, and to those persons (*viz.*) Russel, Rich and Lake, who should during the term to them limited, raise, &c. And where there was no estate, no trust could be annexed, nor could there be trustees of that estate which had no being: it were to suppose *accidens subsistere sine substantia in quo existat*, and it were *coloratum sine colore*; and it could not be equitable to make the first ninety-nine years liable to this 6,000*l.* for there is no such thing appointed by the first ninety-nine years. And the plaintiff here claims by a voluntary conveyance without any agreement or contract precedent for the doing thereof; but the defendants claim upon a valuable consideration of 4,000*l.* marriage and jointure: and it is a hard strain to translate a trust charged particularly on an estate of ninety-nine years, which is a void estate beyond the words expressed to another estate; for though in truth Nicholas might have charged the first ninety-nine years after the first 6,000*l.* charged thereon, yet he did not do it: and the mention that the deeds 1651, and 1653, were for a portion of money paid, that is untrue, for no more was paid than what was paid and satisfied by the former settlement 1649.

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The Lord Chancellor decreed the contrary, that the trust of the last 6,000*l.* should be charged on the first ninety-nine years. For Nicholas intended the raising thereof, and had power to charge the first ninety-nine years therewith after the other 6,000*l.* raised, and regarded only the parties intent to raise the money, though he pitched not on proper means.

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But it was objected, that the plaintiff's title being voluntary, and the defendant's for valuable considerations, the plaintiff's title *prima facie* is fraudulent against a purchaser.

The Chancellor said, a voluntary conveyance may be good and not fraudulent, and that from the circumstances of persons of honour who are trustees, and concluded it not fraudulent.

And though he was pressed to direct a trial at law on that point, would not do it, for whether fraudulent or not, is proper for this court.

The defendant being a purchaser had no notice of the trust on the last lease or estate for ninety-nine years, and so not bound by it clearly, she nor her friends having no actual notice. And the rather for that the deed of 1651 was revoked, and so is recited to be. And there is indeed mention that an estate was to be created to Russel, Rich and Lake, and their heirs, but no mention that there was any new estate for ninety-nine years to be made to them, nor of the trust to raise the 6,000*l.* herein mentioned.

A recital of the deed which does refer to the incumbrance is notice against a purchaser.

But my Lord Chancellor declared, that there was sufficient notice in law, or an implied notice; for the mortgage to Hewet was excepted in the defendant's conveyance, and therefore they could not be ignorant of the mortgage, and ought to have seen that, and that would have led them to the other deeds, in which, pursued from one to another, the whole case must have been discovered to them.

But against this it was objected, that the defendant could not enforce the mortgagee to show his assurances, nor would any mortgagee so do; and when there was only 2000*l.* due thereon, which the jointresses' friends were content to be charged with, there was no reason to inquire further, especially into things collateral to the mortgagees' estate. Besides, notice to charge a purchase ought to be perfect and complete, and there was no means for such notice; for two things were to be notified, (*viz.*) a power to charge the 6000*l.* and execution of that power, of which there was no colour, nor no means to be informed. For Isabel's power was general to limit the 6000*l.* to any person or persons at any time by deed or will; so the inquiry was uncertain and almost impossible to find out.

Mr. Keck pressed it much, that it was without precedent, that a voluntary conveyance should be decreed against a pur-

chaser for valuable consideration. Purchasers were ever favoured by the court.

My Lord Chancellor was not moved with this objection.

Philips against Philips.

Nicholas Philips, the testator, made his will, and made the defendant executor, and devised divers legacies, and the residue of all his personal estate to the plaintiff. The executor was debtor to the testator in 400*l*. He left sufficient personal estate to pay all his particular legacies.

A debtor executor to the testator, decreed to pay to the devisee of the residue &c.

The question was, whether the 400*l*. being discharged in law to the executor, should be accounted as part of the residue, there being no need of it to pay debts or legacies particularly given; for the testator must not be supposed ignorant, but knowing of the law, that by making his debtor executor he thereby discharged the debt, and so the 400*l*. became no part of the personal estate, and so no residue thereof. And difference was pressed between legatees and debtor, in which the debt, though discharged, should be assets, and where it was between the executor, who is in this case in effect a devisee of the debt.

But the Lord Chancellor disallowed the difference, and decreed for the plaintiff the residue, &c. against the executor. Though it was objected that this case was different from former precedents.

Gartside and Elizabeth his wife, and Ann Ratcliff, an infant, plaintiffs, against Peter Ratcliff and others. November 6.

The case was, Ann, the mother of Elizabeth and Peter Ratcliff the defendant, agreed that a marriage should be between the plaintiff Elizabeth and Peter, son of the defendant Peter Ratcliff. The portion 500*l*. and lands of Peter and the defendant were to be settled, part on Peter, the father, for life, remainder to Margaret, his wife, the remainder of these lands and all other his lands in possession to Peter the younger, and his heirs, free from his incumbrances. The marriage was had and the portion paid, and a deed executed by Peter, purporting a feoffment to the said uses. But Peter, the father, by a will and trick set forth in the bill and proved, got the same again into his hands, and burnt or cancelled it.

Deeds suppressed and the lands decreed without trial.

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The bill is for relief that the plaintiff Elizabeth, the wife of Peter the younger, may be relieved for the profits of one third of the lands settled in possession in fee to her husband, and the infant to have the other two parts of the inheritance of all according to the marriage agreement and deed in pursuance thereof. Peter, by answer, denied the settlement, and Henry the son did so also, and that he had no notice of

the agreement, and made title to the lands by a former marriage settlement on the marriage of Peter, the father, to the father of Peter for life, remainder to the first, second, &c. sons of Peter, in tail, to the heirs male, &c. so as Peter, who made the settlement by which the plaintiff's claim, was but tenant for life, remainder to Peter, the son, in tail, remainder to Henry the defendant, second son of that marriage, and to Peter the first. And so Peter the first son being dead without issue male, the land remained to him. But a recovery was produced by the plaintiff, suffered by Peter the younger, that he objected against the recovery, because the father was tenant for life, and survived not.

The plaintiff had a decree according to the bill, and confirmed on rehearing of the cause in Hill. 28 Car. II. by the Lord Chancellor, because the father suppressed and got into his hands the writing, which was done for his advantage, for he needed not have so done for Henry's advantage; and where deeds are suppressed *omnia præsumuntur*.

And the Chancellor would not allow a trial at law whether the father surrendered to enable the recovery or not.

[294] *Sir Francis Hill against Sir Robert Carr. November 6.*

Sir Robert Carr covenanted with Sir Francis to secure 6000*l.* to Sir Francis in consideration of marrying his sister. Much debate was formerly whether it was a covenant, and so obliging to Sir Robert, or no; and judges assisting, there was a difference in opinion in the point, that it was a covenant; for wherever the intent of the parties could be collected out of a deed for the not doing or doing a thing, a covenant will lie. And the Chancellor declared his opinion to be so. And a covenant will lie on a bond, for it proves an agreement. And for further security a fine of certain manors to be levied by Sir Robert, and a decree was pronounced accordingly. But on rehearing it was questioned whether the decree should be for the fine to be levied presently, or till the account between Sir Robert and the plaintiff settled; for Sir Francis had received some money. And it was pressed by defendant's counsel, that till the account pass, the duty was uncertain.

2dly. That Sir Robert by levying a fine tenant in tail should subject his estate to other judgments and statutes. It was answered, security ought to precede payment; and if he were subject to other statutes they were his own debts, and his act ought not to prejudice Sir Francis, who was entitled to have a fine by Sir Robert his own covenant, and there was no reason the court should hazard the plaintiff's debt lest Sir Robert should be made subject to other debts.

In what cases
action of co-
venant will
lie.

Decree for
security of
the money
which depen-
ded on ac-
count, whe-
ther the secu-
rity shall be
given before
the account
stated.

But the Lord Chancellor declared, as he after decreed for the reasons, *ut supra*, that the fine should be respited till the account settled.

It was objected, that Sir Robert being tenant in tail, if he should die before the account settled, the issue in tail will not be bound by the decree.

But the Lord Chancellor answered, that the covenant being in pursuance thereof, the decree will bind the issue, seeing the father of Sir Robert had power by fine to bar the issue.

And another matter was, the defendant was left to his remedy at law on the land by way of covenant, to recover such damages only as he had sustained by not settling the jointure on his wife, though she was now dead.

And we objected, that this bond was for the wife's advantage in trust for her.

The Lord Kennoule, against the Earl of Bedford and others, Trustees of James, Earl of Carlisle, whose heir at law the plaintiff was. December 19.

The case was, the earl by his last will devised his debts to be paid by his lands in D. and if those sufficed not, by sale of his lands in S. and if those sufficed not, by sale of his park; and if that sufficed not, by sale of his lands in Waltham, and devised that the plaintiff should have 600*l.* per annum, during his life out of his lands in Waltham. The trustees sold D. and S. and a great part of his lands in Waltham, and paid the debts; but the park was not sold; but the lands in Waltham not sold are not sufficient to answer the annuity which was 4,000*l.* arrear. It was prayed that since Waltham lands were sold instead of his park, that the park might be sold to satisfy the arrears, which was ordered accordingly, and the money to be so applied. But there arose some impediment in the sale by reason of some title pretended to the park by some who were no parties to the bill; and thereupon, however, the possession of the park was decreed to the plaintiff against the trustees, and all the profits of Waltham lands unsold.

Freeman against Goodham. December 19.

The wife when sole, bought goods for money, and after married, and died. The goods came to the husband's hands after her death, but the debt remained unpaid.

The bill by the plaintiff, the creditor, was to discover the goods, and a demurrer thereto, which was over-ruled by the Lord Chancellor, who with some earnestness said he would change the law in that point.

DE TERM. SANCT. HILL.

Anno Regis 28 & 29 Car. II.

IN CANCELLARIA.

Pain against January 18.

The husband
pleads: His
wife will not
swear to it.

A bill by the plaintiff against the husband and wife, daughter of the plaintiff. The husband put in a plea in the name of him and his wife, and swears to the plea; but the wife would not be sworn. The husband moved that the plea might be accepted, suggesting that the wife did it by combination with her mother.

Ordered that the plea stands as for the husband, and the plaintiff to proceed against the wife.

Ford Lord Grey, against the Lady Grey, and others.

Et c contra.

The father
purchaseth in
the name of a
son unadvanced,
it is an
advancement;
not a trust.

William Lord Grey had issue, Thomas his eldest son, and Ralph his second son: William the father for 13,000*l.* purchased the manor of Gosfield in the name of Thomas and his heirs, and he enjoyed it, and took the rents and bought other lands adjoining in his own name, and added them to the park, and inclosed them therewith, and owned all as his own sometimes; and Thomas declared several times that the manor was his father's, not his, or to that effect. But on the other side divers speeches of his father's were proved, that it was his son's, and the son by his will gave the manor to his father for life; and divers speeches also by the son and father that the manor was Thomas his manor, and the father proved the said will, being executor.

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The question was, whether the purchase was a trust in Thomas for the father, or an advancement by the father to the son. And decreed an advancement, not a trust. And whereas the father did after the death of Thomas, convey Gosfield and three other manors in trust to raise 2,000*l.* for two other of his grand-children, Ralph and Charles, Gosfield was not liable thereto.

Another question was: Ralph, father of Ralph and Charles, and of Ford, did make a conveyance of Gosfield to trustees and their heirs, to pay his debts and legacies; and after for performance of his will, and at the same time made his will, and thereby did devise the trustees to pay 2,000*l.* a piece to Ralph and Charles, and also 6,000*l.* to Katharine his daugh-

ter, the surplus after to his heir Ford, and made his wife one of the defendants executrix, but gave her not thereby in terms the personal estate, but only made her executrix; and devised that his said three children should release to his executrix all such actions and demands of his personal estate to his executrix. Now the question was, whether the executrix should be liable to the legacies of the children in aid of the heir, who had the surplus of Gosfield that was to be sold?

As to the creditors it was agreed, she must be liable; but as to the children's legacies there ought to be no aid for the heir; for when the legatees were by the will to release all demands out of, or to the personal estate, they could make no demand out of it, which shows his intent, that therefore as to the interest and legacies the personal estate was to be discharged, and the executrix to enjoy the estate free against them, and therefore the heir not to charge the executrix, as for those legacies of which he discharged his executrix, especially having otherwise provided for their satisfaction. And the surplus to the heir is expressly after debts and legacies paid; therefore not before.

Against which it was said, that regularly the personal estate must aid the heir; and an implied intent must not without clear expression alter the equitable general law.

And there were other reasons for the release to be given (viz.) the estate was in the province of York, liable to the children for portions.

The Lord Chancellor decreed the personal estate to be accounted for in aid of the heir in order to aid him for what he should be charged withal, not only as to the creditors but as to the legacies charged on Gosfield (viz.) the 6,000*l.* to the younger children.

DE TERM. SANCT. TRIN.

Anno Regis 29 Car. II.

IN CANCELLARIA.

Boynnton, against Sir Robert Sprignal. July 3.

Term conveyed on trust to be void on purchasing and settling on Sir Sprignal for life, and after to his wife for life, with remainder over of, an indefeazible title, and not tithes, &c. and this trust was declared by deed indented. After the husband accepts of lands in Buddington, part of the lands of the Lord Craven, and desires the same in lieu and satisfaction of what was to be done.

The Lord Craven on restoration of the king enters.

The Lord Chancellor decrees the trustees to surrender the lease to the purchaser of the lands which were aliened by Sir Robert Sprignal.

Note.—A trust by deed interpreted to be satisfied by the lands of a bad title, though the deed of trust be of an indefeasible title, on proof of discourse, and mention that the meaning was to settle delinquents' lands; and the feme covert bound by agreement of the husband.

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Needler against Deeble. July 12.

The mortgagee bound by the account between the first mortgagee and mortgagor. Mortgagee sued the mortgagor to pay, or be foreclosed of redemption. An account was directed and settled before a master; and now a subsequent mortgagee, whose mortgage was made before the former bill was exhibited, sued the first mortgagee and mortgagor to have a new account, supposing the former account to be false, and made by consent and fraud; but did not insist on any particulars, as in such case he ought.

No travelling into an account stated, but by charging of particulars. The Lord Chancellor declared that the account should bind the second mortgagee without farther examination, if the fraud and collusion were answered; for the first mortgagee did all he could, and is not bound to seek after the second mortgagee; for then it should be in the power of the mortgagor to make the assurance uncertain and endless to the mortgagee. It shall suffice to deny the fraud and collusion.

[300]

DE TERM. SANCT. MICH.

Anno Regis 29 Car. II.

IN CANCELLARIA.

Aylloff against Fanshaw. October 15.

Money brought into court embezzled. The remembrancer of the exchequer takes money brought into his office by order of court, and spends it, and dieth; the succeeding officer (fearing to be charged with the money, viz. that his office would be sequestred, viz. till the money made good by the profits thereof) sues the party who ought to pay the debt, viz. the defendant Fanshaw, who was bound with the Lord Fanshaw to the lady Kent, upon account of which debt the money was brought into court, and which defendant was executrix, &c. to the party, the late remembrancer, who mis-employed the money. And a demurrer to this bill was disallowed, and the plaintiff might proceed in chancery.

Barns against Canning and Piggot.

A bill was exhibited to redeem a mortgage against Canning. *Pendente lite* Canning conveyeth his lands in question to Piggot, for money. The cause being brought to hearing, and a decree for Canning, and enrolled; Canning being to borrow money of Barns, gave him a conveyance of lands, and assigned the benefit of that decree, which were both, viz. the conveyance of the lands and the assignment of the decree defeazanced for payment of the money borrowed by Canning of Barns. Barns parted with the money, till that as well the assignment of the decree as the assignment of the lands were made, the lands without the benefit of the decree being not of value sufficient for the security. Barns offered in court to resign to Piggot and Canning both land and decree on payment of debt and damage, and insisted that Piggot coming in *pendente lite* could not in Canning's name nor his own, sue a bill of review. Barns' suit was to set aside a release of the decree which Canning had made for no consideration.

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The Chancellor disliked the purchasing of decrees, and said he was mad that would do it: yet if the plaintiff had it, he would not avoid it, but made the question to be, whether that the assignment of a decree was not a collateral and supplementary security, and not an original security, and so took it to be, and dismissed the plaintiff.

He is mad that will purchase decrees.

Assignment of a decree a collateral supplementary security.

Sir Robert Austin's case, who purchased and paid the same day that the bill was exhibited by Culpepper, yet lost his purchase, having no notice of his suit.

Pit against Pidgeon. November 26. Et e contra.

A. deviseth that 300*l.* be paid to his child which he shall have at the time of his death; and if he have none, then to his sister. Afterwards three children are born to him; then by a codicil he deviseth 200*l.* to each of these children to be paid at their respective ages of twenty-one years.

Devise of 300*l.* to the child he shall have at his death.

After he has three children.

Then makes a codicil, and gives each 200*l.* a piece.

The Lord Chancellor decreed, though the 300*l.* be devised to the child, &c. and now there be three, the devise is not void for uncertainty, but all three children share in it, and that the devise of 200*l.* being without words signifying the same to be of their portions, nor any thing one way or another to revoke or affirm the former gift of 300*l.* it shall be taken by way of accumulation, and the children shall have both legacies.

Legacy and accumulation.

Butcher against Hinton and Short. December 5.

[302]

Short was not brought to hearing.

The case. Butcher and Short, partners in trade, were indebted to Hinton a banker, in a bond of 12000*l.* for payment

of 6000*l.* in October 1675. That money being due, Hinton in December 1675, was called upon by his creditors importunately for great sums of money. He requires Butcher and Short to pay him ; whereupon they and Hinton agree, that for 2000*l.* they will become jointly bound for so much to Hinton's creditors, and for 4000*l.* residue each to be severally bound to Hinton's creditors viz. each for 2000*l.* and not jointly ; and Hinton gave a receipt for 6000*l.* under hand and seal to them, and agreed to deliver up the bond of 12000*l.* And being asked for it, excused the present delivery of it, because of the present hurry of business, but would do it. The bonds to the creditors were accordingly entered into. The agreement *prout* proved by three witnesses. The bill was to have up the bond of 12000*l.* for Hinton in favour to Short endeavoured to charge Butcher.

Hinton in his answer confessed the agreement, but that it was qualified, and part of the agreement was, that Hinton should be counter-secured by their bonds against the creditors to whom he was bound, and that he was damnified for want of such counter-security ; for that he had been sued and forced to pay the creditors 3000*l.* and produced the bonds whereon he paid the money cancelled ; but he had no witness that proved expressly that part of the agreement touching counter-security, but proved four bonds of counter-security sealed, &c. and left with the scrivener, but not to be delivered till matters agreed by Hinton and Butcher.

The Lord Chancellor. Take it for granted, that what Butcher did he agreed to do ; or else he would not have done it.

A voluntary agreement not obliging in equity unless all be performed.

The counsel for the defendant insisted, that the agreement being voluntary, unless all that should have been performed were performed, the defendant should not be bound thereby in equity, and his good security taken from him.

Churchil. The plaintiff fails in not paying nor giving counter-security.

[303]

E contra. It was said, that the agreement was to give bond, not to pay the money ; for the bond once given binds to payment, and the failure of Short to give security may not prejudice Butcher, who did. And the caution to the scrivener must be intended of the relate to, not the delivering up the 12,000*l.* bond ; for no reason to counter-secure and become doubly bound for the same debt, but ought first to be discharged of the old bond and debt.

The Lord Chancellor. This debate assures me that Short has failed, or else the contention is vain ; and the agreement not being fully performed, I cannot take away Hinton's legal security and pay him with parchment ; and Hinton had little avail by the agreement, being bound in the new bond.

Vanacre's case. December 20.

A. was indebted to B. Vanacre in 7000*l.* and to C. and others in 300*l.* and became bankrupt. B. sued at law, and had judgment, and by *feri fac.* 23,000*l.* by goods, but knew nothing of the bankruptcy. C. sued out a commission of bankruptcy, and had those goods that were taken in execution assigned, and for some of them brings an action of trover against B. and hath judgment and execution for 50*l.* or thereabouts. B. dieth, and the assignee of the commissioners brought an action of trover against the executor for the rest of the goods, and recovers 500*l.* and hath it, and then brought a bill in chancery for the rest of the goods against the executor, as in case of an executor, who commits a *devastavit*, and dieth, his executor shall be charged here, though he cannot be charged at common law.

On the first hearing an order was drawn up, that the petitioner and other creditors should come to an account proportionably, have satisfaction out of the estate not recovered. Whereupon the case came now to be reheard and so ordered. Creditors to come to an account, and to have proportionable satisfaction out of the estate not recovered.

The Lord Chancellor. The order is not well grounded, This is not like the case of a *devastavit*, wherein in time the common law will be altered. I should not in this case have decreed the executors to account, but grounded myself on a consent, and then that was, that the whole debts and whole estate be on all hands accounted for, comprehending the money recovered, and proportionably divided.

Then costs was prayed to be, for that the executors should pay contribution money; but decreed otherwise.

Note.—The executor in case of a *devastavit* is in nature of a trustee of an estate. The testator here is a trespasser, to which the executor is no way liable.

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1 Rol. Abr.
376. R. pl. 3.
Moor 556. pl.
Moor 556.
pl. 755. Con.

Willoughby against Perne. December 21.

The bill was to be relieved against a statute of 26 Eliz. 94 years old, by the heir, against a lease of 60 years, made by the ancestor, for A. in trust for 40*l.* a year, to a wife for a jointure, the heir claiming by another statute eign to the lease in trust, so as the lease could not hurt him.

The wife, to protect herself against the statute *pendente lite*, after the bill exhibited, procured an assignment of the first statute, and set it forth by answer. Against which proof was made by the plaintiff, that the defendant, (viz.) the present husband, who married her when a widow, had after the bill forged and falsified the church book, whereby it would appear that the statute was not acknowledged by the besail, as the defendant pretended, and who after the statute purchased the land, but by the besail of the same name. And Antiquity of a statute answered by being proved and interests paid.

that William, the besail, was an infant, viz. of sixteen years, and so it was to be presumed, that after so long time, that his father, and not he, was cognizor, and then the land not being ever in the besail, his statute could never affect the land; and the equity of the plaintiff was on the antiquity of the statute, because of the falsity of the defendant.

The plaintiff's evidence of his defence at law is suppressed, and the defendant having sworn in his answer he knew not of the statute of 26 Eliz. till such time, that was also proved false. The defendant proved the lease and jointure and payment of interest till 1644, and then agreement to forbear extent till 1658, and then a minority.

The Lord Chancellor. This statute being proved, and interest paid, the antiquity is answered, and a man shall not be arraigned out of his estate; and it is not material what was given or paid; for if he paid nothing the heir shall not profit himself by it. But a proposal being made by the defendant, time was given to the plaintiff to accept it, or be dismissed.

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DE TERM. SANC. HILL.

Anno Regis 29 & 30 Car II.

IN CANCELLARIA.

Stock against Denew.

The defendant libelled in the admiralty court of Dover against the ship called the, &c. and suggested himself owner, and that the ship was unlawfully taken from him at sea; and the ship coming into Dover road and arrested, one Parli-van came & *pro interesse suo* pleaded to the process of the admiralty; that during the war between England and Holland, a Dutchman, (naming him,) by virtue of a commission from the states, took the ship and sold it to him, and thereupon the plaintiff, Stock, and his surety, did give a bond to pay the condemnation money. On final judgment of that court the ship was there appraised, and sentence for the plaintiff, because the defendant failed in proof, and the defendant appealed to the duke of York, (Chief admiral of Dover,) and a commission by the duke to hear and sentence, &c. and therein the appellant proved the commission to the Dutchman and captain, and had sentence for her. But the bond being put in suit at the common law, the defendant pleaded the sentence in the appeal. But the question there was, whether the appeal was well brought, because it was not sufficiently set forth that the duke had jurisdiction of the judges in came-

ra scaccarii (for there it was depending by writ of error,) directed search to be made for precedents of appeal to the duke as admiral, but none could be found. The defendant exhibited his bill in chancery, and finds there no relief, for he desired there to examine his witness, and to have a commission for that end. But in regard the appeal was not brought in time, prevailed not.

No appeal from the court of Dover to the high admiral.

The plaintiff petitioned the king on the whole matter, and prayed a commission of review of the Dover sentence; and the Dutch agent or ambassador interposed therein; and it being business of state, and relating to articles made on the peace, an order was made by the king and counsel, that the parties should go to trial, and the property be insisted on, (viz.) in effect, whether the ship was lawful prize or no, in an action of trover. Stock thereupon moved in chancery to stay proceedings on the judgment at law till the trial, which was granted, it being a matter of state, and of which the king and counsel had taken notice. But Stock desired the depositions of witnesses taken in chancery and Dover court, and that the commission from the duke might be used at the trial. By order of chancery those of Dover and in chancery were yielded to; but opposition was made to the depositions by the Dover commission, because they were *coram non judice*.

The Lord Chancellor denied the use of them for that reason. But the plaintiff shall not therefore lose his cause, if he can yet make proof, though he mistook his way; and the case concerns matter of state, and therefore he shall have a commission to prove his cause if he can. But the plaintiff shall bring the money into the court.

Note.—It is admitted at law and in chancery, that though the condition of the bond was to pay the final condemnation of the court of Dover, yet if the appeal had been right, and the sentence of Dover repealed, the plaintiff should be eased of the bond. The injunction was continued till the trial.

Condition of a bond to pay the final condemnation of the court of Dover how relieved.

DE TERMINO PASCHÆ

[307]

Anno Regis 30 Car. II.

IN CANCELLARIA.

Anonymus. April 18.

A commission of bankruptcy was taken out against Thomas Forth the 17th of Nov. 1676, but prosecuted only by Mrs. Rushworth; the other creditors consenting that execution of the commission be forboren a month, but Rushworth did not

consent, nor knew thereof, but herself prosecuted, and she sued Mead, who had possessed the estate by assignment of the bankrupt. And it was insisted at the trial, that Forth, who was the bankrupt, was not so; and after she had a verdict, and the four months were out; three weeks after she petitions to be admitted into the distribution, and now would contribute to the charges, the suspension of executing the commission having been so ordered by the Chancellor; and now directed to be admitted into contribution by my Lord Chancellor.

The lady Turner against Bromfield.

[308]
Whether a
trust of a term
for the wife
be disposable
by the hus-
band.

The plaintiff being to marry Aston, it was agreed between Sir William Aston and Mr. Ewer, the plaintiff's father, that 2000*l.* portion shall be paid, and 300*l.* per annum settled for the lady's jointure. And the lands in question, in order thereunto were leased to Stephen Ewer and Nicholas Ewer, for 99 years, if the plaintiff lived so long, and Stephen and Nicholas remised the lands to Aston for a lesser term, rendering 300*l.* rent per annum. The portion was paid on the marriage, and the inheritance settled on the husband; the husband died, the plaintiff married Sir Edward Turner, and he for valuable consideration sold all his estate at law and equity, which he had in his own or his wife's right, and those under whom the defendants claim, and made a jointure of other lands of 200*l.* to the plaintiff, who exhibited her bill for the 300*l.* per annum, and she is executrix to Nicholas Ewer, surviving trustee. The question was, whether the sale by Sir Edward Turner, her second husband, should bar having the jointure, for there was no agreement for that to bar her first.

But it was insisted on, that though the first husband might not alien, the second might; for it was no more than if a wife were *cestui que trust* of a term, the husband might sell, which was said, he might, for though a thing in action was not vendible at common law, yet is every day otherwise in equity.

The husband
cannot sell
the wife's
jointure by a
former hus-
band.

The Lord Chancellor agreed, if a husband make a lease for years in trust for the wife voluntary, and he sells, this may bind the wife, because of the fraud. But where a trust is created for a wife, as here in this case *bona fide*, the husband can in no wise bind the wife, unless where she is examined, as in a fine, or in this court, else no man shall be able to provide for wife or children. And he had no regard or notice, or not, to the purchaser, though in the cause, nor to the second jointure. And decreed for the plaintiff; and a former precedent in point was shown.

Because then there should be a perpetuity of a term ; and though there be difference in words when lands of freehold are devised to one for life, the remainder afterwards to his heirs immediately, and when a term is so devised, the difference is in words ; and new estates, jointures and settlements are of long terms. And a similitude is between them, &c.

DE TERM. SANCT. HILL.

[309]

Anno Regis 30 & 31 Car. II.

IN CANCELLARIA.

Civil against Rich. January 24 & 25.

The question was on a will, whereby after other bequests this clause was added, viz. Item, all the rest of my lands, goods and personal estate I give to A. B. on trust, to give my children and grandchildren according to their demerits. The testator died : the devisee, who was heir and executor, gives the land to one omitting the rest. And the question was, if that was a disposition according to the trust, and was much argued.

All the rest of my estate I give to A. B. to give to my children and grandchildren according to their demerits.

The Lord Chancellor. I take it for a rule, that wheresoever there is a demand in law or equity, there must be a certainty of the thing demanded to be adjudged or decreed ; here it is left both for the time when the demand shall be made and to the sum or proportion of the lands, and here is by that means an uncertainty of the parties to whom he may afterwards have more or less grandchildren. I sit not here to make the wills of men, nor to interpret them farther than the wills go ; and therefore as to the settlement of the lands on one and not on all I cannot alter ; it is clear the children are not to come in by the will immediately, but by the act of the devisee ; and he is to give or distribute according to their demerits ; therefore he is judge ; and dismissed the bill as to that.

Wheresoever there is a demand there must be a certainty of the thing demanded.

He remembered several cases in this court, viz. one adjudged by himself, where the husband of a second wife having two daughters by the first, devised his personal estate to his wife to be distributed among the daughters during the widowhood of his wife, and died ; she married again, and afterwards gave the whole to one of them, in that case the other was relieved, because the power of distributing during her widowhood did determine upon her second marriage, and a trust may be annexed to a power or to an estate with power.

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Devises to his wife to distribute among his children during her widowhood she marries, and then distributes, not good.

He also remembered a case between and Devises to his wife in hope in the Lord Egerton's time, where one possessed of leases for

she will leave years devised them to his wife, and hoped she would leave it to his son, them his son, and died. Her second husband granted the no trust. leases away ; the son sued to be relieved, but was dismissed ; for it was no trust for the son.

And in the principal case, he said, though they amounted not to give the plaintiff the lands, yet the words were not idle, but put a restraint on the devisee ; for though he might give the lands as he did, yet he could not give them in possession or remainder to any stranger, but only to the family.

Whether the estate which a citizen hath as executor to another, be liable to the custom.

Then another question arose touching the personal estate, wherein the point was, that a citizen of London, being residuary legatee, dying, whether this being but a legacy, which till election rested *prima facie* in the legatee, not as legatee, but as executor, (for he was executor) and the first testator's estate, which remains in the executor as executor, shall not be subject to the custom as the executor's own estate.

The Lord Chancellor decreed the contrary, and said, I will make election for him.

Clark against Danvers. January 28.

Samuel Wats, grandfather of the plaintiff, took a copyhold estate in reversion for three lives : and the copy was to Elizabeth, mother of the plaintiff, and to J. S. and Danvers successively. Elizabeth was made the purchaser, viz. *et Eliz. dat pro fine 4l.* By the custom of the manor the first taker may bar the remainder. Danvers the defendant was godson to the said Samuel, Elizabeth the first taker, and J. S. died. Danvers is admitted ; the copyhold was decreed to the plaintiff, heir and executor to Elizabeth ; for my Lord Chancellor held, that though Samuel paid the fine ; yet when by his consent Elizabeth was made purchaser in the copy, it shall be taken as all one as if she had paid it. And if so, it shall be intended that all the estates in remainder were in trust for her, and she hath power, as by the custom, so by the trust, as *cestuy que trust* to dispose of them.

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Trust of a freehold for life decreed to the heir.

Sir Francis Winnington objected, that however the plaintiff was not entitled ; for as heir or executor she cannot be entitled to the trust of a freehold for life.

The Lord Chancellor. Who shall have it, &c.

Gold against Canham. January 28.

Gold, Lee and Canham were partners in a trade at Leghorn ; upon account they dissolve their partnership, and Gold had his share satisfied him out of the stock. Many years afterwards Gold had occasion to receive 500 dollars at Leghorn, which was to be paid him for merchandize by A. B. another stranger, which no way related to the partner's trade. The

500 dollars were consigned by bill drawn on Kirk by Canham payable to Gold, to be received for his use, and Gold received them. Canham sued at law for the dollars. Gold sues here to be relieved, and insists that he ought to detain the same, because when the partnership was dissolved, Canham did covenant to save him harmless from all losses and damages due or which might be due, or brought on, or which might or should happen to him the said Gold in relation to his part ; and that long after the dissolution of the partnership he was sued by the Duke of Tuscany for customs unpaid at Leghorn, for the goods which belonged to the joint trade, which amounted to 60*l*. and costs, which he had paid, and therefore insisted to retain to pay himself out of the dollars.

Retainer of money in his hands for satisfaction of a contract to save harmless.

Mr. Attorney Jones. The partnership has long surrendered, (I think he said fourteen years) in all which time we have nothing to do with Gold, and the 500 dollars is paid only to our use, and no relation to the partnership. And the covenant to save harmless is no debt, but only rests in damages. And to the sentence in law we are no party, nor ever acquainted with it. And by what evidence or faint defence made by Gold the sentence was given, we know not. And it is more probable when Gold had his money in our hands he on design to pay himself out of our money in his hands made faint or no defence. And it is improbable that the duke's officers should be so long negligent of the dues to the duke, and the plaintiff should have given notice to the defendant.

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The Lord Chancellor. Whether the bill of exchange was before or after the sentence doth not appear.

Mr. Attorney objected. This is like a foreign attachment to pay due on one account, or occasion out of another ; and the money is not due from Canham only, but also from Lee, till at last it was answered, that Canham's covenant extends to all which Gold's part suffered.

And decreed accordingly.



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THE SECOND PART
OF
CASES
ARGUED AND DECREED
IN THE
HIGH COURT OF CHANCERY,
CONTINUED
FROM THE 30TH YEAR OF KING CHARLES II.
TO
THE 4TH YEAR OF KING JAMES II.



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—
1828.

TO THE

RIGHT HONOURABLE

SIR NATHAN WRIGHT, KT.

Lord Keeper of the Great Seal of England, and one of the Lords of His Majesty's most Honourable Privy Council.

MY LORD,

The following sheets humbly present themselves to your Lordship's view, no ways presuming on their own worth or merit, but wholly confiding in your Lordship's goodness to accept them.

The author (if I am rightly informed) was, when living, for many years a practiser of the first rank, in that high and honourable court of which your Lordship is now the head and greatest ornament.

The subject matter being Equity, it carries something of pretence (with your Lordship's pardon and permission) to be addressed to your Lordship as the fountain of Equity.

You have, my Lord, not only the custody of his Majesty's royal Seal, but you are the great and just dispenser of the royal equity and conscience ; and, I hope, of mercy too, in forgiving the confidence of this address.

My part herein has been little more than midwifing into the world another's orphan issue ; and I was glad of finding this occasion publicly to profess myself, my Lord,

Your Lordship's most humble,

And most obedient Servant,

J. W.

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DE TERM. SANCT. HILL.

Anno Regis 30 & 31 Car. II.

IN CANCELLARIA.

Bland and Middleton.

By will in writing J. S. seised in fee deviseth land to his daughter E. and her heirs; and his mind is, if his son A. pay to her 50*l*. then his son should have that land; the money was not paid at the day appointed by the will; the daughter sells the land, it was decreed by the Lord Chancellor against the vendee, he paying the money, for he took it but as in the nature of a security, though it was objected by Sir Fr. Winnington, that this is a contingent devise to the son on payment, and then too, if he had performed and paid, he could have had but an estate for life, the remainder or reversion in fee to the daughter.

Heir relieved
ag't wife for
devisee for
her life.
Devise.
Condition.

Note. It is no reason, that his failure should give the son a greater estate in equity than the will in writing gives him, on performance of the condition by the express words of the will in writing, and the will cannot be of land, but in writing: So as if the testator having made such will in writing had by parol declared that the son should have the fee-simple on payment, it should not avail; yet it was decreed, *ut supra*.
Quare si bene.

Morley versus Morley. 15 February, 1678.

The defendant was trustee for the plaintiff an infant, and received for him 40*l*. in gold, a servant of the defendant living in the house with him robbed his master of 200*l*. and the 40*l*. out of his house. The robbery, viz. that the defendant was robbed of money was proved; the sum of 40*l*. was proved by only the defendant's oath.

[2]
Trustee robbed.

Lord Chancellor. He was to keep it but as his own, and allowed it on account; so in case of a factor, so in case of a person robbed, for he cannot possibly have other proof.

Anonymus. 25 February, 1678.

A suit was begun for a legacy and to discover assets, no assets sufficient being discovered; after other assets came to the executor's hands, and a second bill for the legacy, and assets thereon discovered, and the Lord Chancellor gave de-

Damage for
legatee.
Demand tho'
no relief by
the Bill.

cree for the legacy, and damages from the first bill exhibited ; for that was a good demand of the legacy, though it was not presented and not only from time of assets.

DE TERM. SANCT. MICH.

[3]

Anno Regis 32 Car. II.

IN CANCELLARIA.

Bevan versus Dike. 27 November, 1679.

Relief on
matter not in
issue.

The plaintiff's wife and administratrix to her husband sues Dike, mortgagee of a dye-house and vessels, but the administration was repealed because she was married, and it was said at the bar, that she was so sentenced because she was married by a non-conformist minister : but it was but said, and to that saying the Chancellor said it might be allowed as well as by a Romish priest, or he said to the like effect ; but nothing proved. The cause being heard, the court in regard of the repeal of the administration could not relieve her, but in the proof it appears she had another title not set forth in the bill nor put in the issue, viz. that the mortgagor before witness gave 2s.6d. to the heir, and declared, that the plaintiff should sell the house, pay the mortgage, and with the house and trade of dying maintain herself and children, so that it was a parol declaration of a trust.

Object. It is not alleged nor in issue, therefore, &c.

Chancellor. Where I see right I will have it tried ere I decree against it, and it is no inconvenience, for the inconvenience is because the other side cannot examine to what is not alleged, but at the trial he may, and so directed a trial on that point.

[4]

Heir helped
ag't wife
devisee.
Discovery.

Anonymus. November 27, 1679.

The husband devised lands in question to his wife for life, the son exhibits a bill pretending the devise to the wife void, because 25 Eliz. the lands were entailed to his great grandfather, to whom he was heir in tail ; and to discover the deed in tail, the wife confesseth writings in her hand ; she is ordered to bring in all the writings, and it fell out that the deed of entail was among the rest. The heir by a motion *ex parte* gets all the writings out of court, and, on motion after was ordered to bring them in again, and they are now in court.

At the hearing Mr. Keck prays that the heir may not make the court an instrument to help the heir to the deeds, but that she, the defendant, may be in the same condition as she was

before the writings brought in by her in obedience to the court, for though the devise was voluntary and not in pursuance of articles in marriage, yet unless the heir would confirm her estate, he ought not to be assisted by the court, for there is a consideration (to wit) to provide for his wife, and so had it been if the father had in like manner devised to younger children, for the consideration in law is good, (wife) to raise a use at common law.

He affirmed there were precedents for him, and the rather, because the father had power to dock or bar the entail.

Chancellor. I will never help the issue against a purchaser, but here it is a bounty in this case, and in such case the heir having a good title shall be aided; and decreed the deed to the plaintiff.

Anonymus. November 27, 1679.

The case was. The father seised in fee mortgaged the land and gave a statute to the mortgagee to pay, &c. and made his will, and devised 500*l.* to his daughter and died, the mortgagee took so much of the personal estate in execution on the statute that thereby there was not sufficient assets left to pay the legacy. The question was now that the heir was discharged or eased of the debt out of the personal estate liable to the legacy; if now the daughter should have relief against the heir, who was eased out of the personal estate which was liable to her legacy; and it was decreed for her.

Real estate made liable in lieu of the personal.

[5]

Chancellor. Where the heir is indebted by mortgage made by his father, or by other means as heir to his ancestor, the personal estate in the hands of the executor shall be employed to pay that debt in case of the heir; but if there be not assets to pay other creditors or other end of the testator on his legacies, the heir shall not turn his charge on the personal estate. In this case here was sufficient to pay the debt by the mortgage, &c. and the legacy out of the personal estate, and when both can be satisfied both shall be satisfied; and the contrivance to make the personal estate liable to the legacy towards satisfaction of the mortgage, (looks like a fraud) and shall not prejudice the legatee, but she shall have recompense against or upon the mortgage, though originally not liable to her. And my Lord cited several precedents decreed upon the same reason.

Heir executor.

Management of the estate.

Legate versus Hockwood. Nov. 27, 1679.

The plaintiff bought of the defendant five sixteen parts of a ship, which he had formerly sold by bill to the plaintiff, and gave him bond for the money, and after the first bill kept the bill, saying, he would keep it till he were paid, and being af-

Money secured by bond discharged the assurance.

denied on demand.
Consideration.
Assurance.

ter requested to make a bill of sale to the plaintiff, refused to do it; the plaintiff pleads, that by reason thereof he could not dispose of his interest, for though he had title by the verbal sale, yet none would deal with him on such terms without a bill of sale to make out his title, but he did not instance in any particular person, who refused to deal with him. The plaintiff sent the ship to sea, which made a losing voyage; at her return to England, the defendant then proffered a bill of sale, but the plaintiff refused it, and now sues to have up his bond, though he had not paid the money.

Chancellor. When the ship was sold it is implied, that the vendor should make assurance by bill of sale, but not unless it be demanded. Was it demanded?

[6]

The counsel for the plaintiff read and proved a demand.

Keck. Here is a bargain executed, security for the money given, possession taken by the plaintiff, and the ship employed by him and safe returned, and we pray to have our money according to security to us for our ship given, which he hath.

Chancellor. When you had security you ought on demand to have made assurance; if a man buy lands and secure the money, if he who sells will not make assurance, when reasonably demanded, he shall lose the bargain; therefore decreed the bond to be delivered up, and the five parts, &c. reassigned to the defendant.

Fashion and other creditors of Anthony Pearson, deceased, plaintiffs, against Atwood, executor, and John Atwood, and against the debtors of Anthony Pearson and Ralph Pearson, administrator de bonis of Anthony Pearson, defendants, on the hearing, 4 December, 1679. The case was:

Parol assignment of debts.

John Atwood, a merchant in Norwich, deceased, employed Anthony Pearson, deceased, as his factor in London, to sell stuffs for him, and did charge him with great sums of money by bills of exchange, many of which Pearson accepted, and finding that he had accepted more bills than assets to satisfy, complained thereof to Atwood, who thereupon willed him to go on, and agreed that he should sell the goods, and dispose of goods and debts as his own to secure himself; which he did, and sold to the defendants, and entered them in his accounts in his own name, and the buyers (some of the now defendants) knew not whose goods they were, but bought them of Anthony Pearson; two days after the agreement John Atwood, the merchant, died; afterwards Anthouy Pearson, the factor, assigned those debts so contracted to Packer, another defendant, to the use of the creditors of Anthony Pearson, and dieth. The scope of the bill was, that accord-

ingly the said debts may be employed to the use of the creditors of Anthony Pearson according to the assignment.

B. Atwood, executrix of John Atwood, opposed it for that she was subject to demands of divers persons by bond, which debts by bond are to be paid before any debts by verbal agreement; and though Pearson sold the goods of Atwood to the defendants, yet Atwood might sue for the debt in his own name (which was not denied,) and though in Atwood's lifetime he could not avoid his agreement, yet the case is altered by his death; for himself was equally liable to his verbal agreement as his bond; but the executor is not so, for he must pay bonds before simple contracts.

[7]

It was said for the plaintiff, debts though not assignable in law are on good consideration assignable in equity, and though the property of the debt be not altered, yet it binds Atwood, the assignor, and consequently his executor. So as the one nor other can avoid it in equity, and there is no danger of *devastavit* to the executor; for it cannot come to the executor's hands, for the executor is bound by the assignment as well as the testator, and till it come to his hands the executor cannot be charged.

The Attorney General objected. The creditors by bond are now concerned, for they ought to be preferred before a verbal agreement, and the executors for them in their behalf.

The Chancellor seemed to incline much against the plaintiff, but directed a trial on this point, viz. if there were any agreement between the factor and merchant, that the factor should have the debts for his security.

It was insisted on as a custom between merchant and merchant, that all accounts should be evened on either side by way of estoppel, when the business was of the same employment, &c.

Temple contra Rowse. Dec. 8, 1679.

A decree was made, and before costs taxed, the plaintiff died, and a bill of revivor brought and disallowed by the Lord Chancellor, on plea *que ne gist pour costs*. No revivor for costs only.

Wakelin contra Walthal. Dec. 8, 1679.

A decree being passed, the defendant to a bill to execute the decree, set forth a parol agreement in bar; to which answer the plaintiff demurs, and the Chancellor allowed the demurrer, though the agreement were subsequent to the decree; the decree shall proceed, and if the defendant will have advantage of the agreement, let him bring an original bill, for if he have advantage by it in way of defence, one witness may serve his turn, but to an original bill here if he

[8]

Verbal agreement
no stay to execution of a
decree.

in his answer deny the agreement, one witness will not convict him, so as by this way of answer the plaintiff should lose the benefit of his answer.

Anonymus. 9 Dec. 1679.

Stat. Car. II.
will.

Mortgagor after forfeiture by will in writing since the statute, and attested only by two witnesses, devised the land, and upon trial a verdict against the validity of the will; for the question at the trial was not on the point of equity, whether the equity of redemption passed by the will, but whether the lands passed, the mortgage being then unknown, but discovered since?

And now Mr. Eccleston moved, that this is not within the statute which nulls such wills only in case of devise of lands by virtue of the common law, statute or custom, but a devise in equity is not good either of those ways.

Devise.

Chancellor. I cannot tell that, but before the statute if a mortgagee before the condition broken devise, &c. it is void, for a condition is not deviseable, but after forfeiture the equity of redemption is deviseable.

[9]

Hodges contra Waddington. 11 Dec. 1679.

Executor,
pending a suit
for the estate
voluntarily
pays a lega-
cy, the estate
is evicted, he
is remediless.
Executor.
Eviction.
Loss.

The question and case was. An administrator possesseth himself of the intestates's goods, and deviseth legacies and dies, his executor voluntarily without compulsion of suit pays the legacy, there then being a suit in right of the intestate, to recover the goods, and after that the goods are evicted from the executor; so that now he hath not nor truly had assets for the legacy: the executor sues to have back from the legatee what he paid, and in truth was not bound to pay, but voluntarily did.

The Lord Chancellor advised: but in the same day in the afternoon the Lord Chancellor dismissed the bill, because the executor paid the money voluntarily without compulsion by suit. And 2dly, with his eyes open when he knew that the estate was in question, so he was aware of the danger of the action. If the suit for a legacy be in the ecclesiastical court they make the legatee give security, because when the legacy is paid they cannot restore, &c. And here the court decrees a legacy without security (unless in case of poverty or the like) for this court can reach the legatee again if there be cause.

Trethewy contra Hoblin.

No costs of
trial if the
title not good
but probable.

Trethewy purchases of Francis Hoblin, son and heir of Thomas Hoblin, lands called Bawdo, and by another purchase purchases Penhale Prideaux, and had mortgage of

Penhale sans addition, and Penhale Hungerford, the purchase money and debt 3,000*l.* the estate of Penhale and Hungerford was in reversion after a jointure to old Hoblin's wife.

Trethewy's bill was against Thomas Hoblin, the younger son, and Hawkey an attorney. The equity was to discover incumbrances, examine witnesses, have up the evidences and writings, which the younger son being executor to his father hath, and to be enabled to try the title, which he could not do without aid of this court during the jointress's life.

A trial was in Devon for Penhale, but set aside on certificate of the judges *coram quo*, &c. and a new trial in Banco Regis by a jury of Middlesex touching Penhale, which past against Trethewy, and a trial for Bawdo, which was claimed by Hawkey, which past for Hawkey.

The cause was now heard again 16th December, 1679.

The point in debate was, whether Trethewy, who had lost his money and security, and had a probable cause of suit, should pay costs at law or here?

The Lord Chancellor ordered not any, but the defendant might enter judgment at law, but no costs there.

Green & Mary Uxor, contra Hayman, &c. 19th Dec. 1679.

The case was, George Rook, grandfather of Mary, seised in fee, devised the lands in question to Lawrence his son, father of Mary the plaintiff, and also of the defendant Hayman Rook for the life of Lawrence only, remainder to the first son of Lawrence, and the heirs male of such first son, and so to the other sons in *præsat' terminis*; the remainder to John Brown and Lancelot Johnson, &c. for their lives on trust and confidence on them reposed for the better securing of the several remainders before limited; the testator died, Lawrence before any son born, by lease and release makes J. S. tenant for his life, and suffers a common recovery to the use of himself again for life, and a remainder for years to the trustees to raise 1,000*l.* portion for his eldest daughter, and then afterwards hath issue the plaintiff Mary and the defendant Hayman Rook, his son and heir, and dieth. The suit is for the 1,000*l.*

Estates transposed to maintain the intent of the will.
De.

The defence by plea was, that Brown, &c. the trustees, to preserve the contingent remainders to the first, second, &c. sons are living, and consequently the estates contingent not barred by the recovery.

Against which it was objected, that Lawrence, till a son born, was tenant in tail, and the estate to Brown, &c. a remainder after, and not before the entail to Lawrence, and so is barred by the recovery, and could not preserve itself, *a fortiori*, not the contingent remainders precedent.

[10]

After debate the Lord Chancellor allowed the plea, for the law will manage and marshal the will according to the intent, which here was to preserve contingent estates limited in place after the contingencies; but if it so should stand in construction of law it cannot preserve them, therefore clearly shall be construed before them.

William Mellish, Esq. Plaintiff, the Royal African Company, and Richard Edlin, Defendants.

The Case.

Merchants of
the African
Company.
In October, 1672, the company chose the plaintiff to be their Agent-general and president of their council at Cape Corsa in Africa, which council was to consist of the Agent-general, and a first merchant, and a second merchant; the first merchant was to be gold-taker, the second merchant warehouse-keeper, and the plaintiff was to have a salary of 400*l.* per annum, two third parts of which was to be paid in Africa, and the other third part in England, when the company had allowed his accounts; and the company gave the plaintiff an establishment or rules by which to guide himself. And by which the out-factories were also to be guided, by which establishment the out-factories were to send their accounts to the company of all their transactions, and gave the company security to be accountable to them for all what they received and paid for them. And the plaintiff and council were also to take the accounts of the out-factories and enter them in their books, which were kept for the company at Cape Corsa castle.

All the time the plaintiff was there (which was three years) the defendant Edlin was (for want of a third person) both gold-taker and warehouse-keeper.

The three years being ended, the plaintiff and Edlin came home, and having delivered up his accounts and papers to Mr. Hodgkins his successor at Cape Corsa, sent the company according to their establishment just accounts from time to time of all their transactions.

[12] The plaintiff expected the remainder of his salary, but the company sued him at law for all their goods sent, and got judgment (*quod computet.*)

To be relieved against which suit, and have the remainder of his salary, is the scope of the bill.

13 July, 1675. The cause came to be heard, and decreed,

1st. That the plaintiff should account with the company as their Agent-general in the said trade at Cape Corsa castle.

2dly, That Edlin should be admitted warehouse-keeper throughout the plaintiff's agency.

3dly, That in making the account the plaintiff is to be discharged of all goods delivered into the warehouse at Cape

Corsa castle, and that went to the out-factories and were delivered there; or that were not delivered there through the default of the master of the ship, or any other accident.

4thly, That the plaintiff should be charged with all goods belonging to the company, which he or any by his order took out of the warehouse and disposed of; and with all goods that went to other factories which were afterwards embezzled by him or his order, or for his use.

5thly, That the plaintiff should be charged with such of the company's, goods as came to cape Corsa castle, and were not delivered into the warehouse, nor consigned to any other factory, but came to the plaintiff's hands or use.

6thly, And if any goods came to any out-factories and product had been answered the plaintiff, and he hath not answered it to the company, the plaintiff is to be charged therewith.

7thly, And that in this and all other matters of the account, wherein the plaintiff is charged he shall not be allowed any thing in discharge, but what he proves.

And that in all cases not before directed where Edlin may be charged, the plaintiff is to be discharged.

That this order was entered according to the minutes, and the defendants acquiesced under the decree so far as to bring in their charge before the master, and accepted a discharge, and took a warrant to attend the master on the discharge.

But instead thereof petitioned the Lord Chancellor to rectify the order, and would have the plaintiff charged with the moneys demanded by the out-factories in their accounts which they sent the plaintiff during his residence at cape Corsa, the petition alleging that near 1000*l.* is demanded by the plaintiff in his accounts in gross for charges allowed by him in the accounts of the out-factories without the producing the vouchers.

In answer to this petition, the plaintiff ought not to be charged with the demands of the out-factories, for he knows not nor is concerned whether those demands be just or unjust, nor can he allow or disallow of them, but must take them as they were given; and if they are false accounts the out-factories are liable to the company, to whom they by the aforesaid establishment are to account and give security so to do.

2. It is not reasonable to charge the plaintiff with what he never received, for the out-factories returned him no more effects than what came clear after the deduction of their demands, which deductions were made by themselves, and not by the plaintiff; nor could the plaintiff and council at cape Corsa refuse such effects as they sent or brought thither; if they had, the company might have complained for that cause.

3. As to the allegation of the petition that the plaintiff demands gross sums for charges allowed in the out-factories ac-

[13]

Vide the 13th article in the establishment to prove the company did direct the underfactors should all account to the company in England, of all goods they received and sold, and send to the company by every ship a copy journal of all the proceedings;

and notwithstanding that accounting to the company in England they were to account to their agent and council at Cape Corssa, so as they might inspect

[14] all their acting, and keep perfect accounts with them in the companies generl books at Cape Corssa. Vide the securities the company usually took of all their factors in Guinea being in their custody. Company's letter to agent Hodgkins to prove this order. Jas. Nightingale proves the burning of the papers.

counts, there is no such thing, the plaintiff making no demands; there being only entered according to the company's said establishment in the books kept at cape Corssa for the company the general and total sums demanded by the out-factories for what they disbursed, nor is there any occasion for the plaintiff to make any such demands, for being not chargeable with what goods were sent to and received by the out-factories, he cannot be charged with their disposal of them, and so hath no occasion to demand any such allowance.

4. As to the charging these accounts in the company's books kept at cape Corssa castle, in gross sums, it was no crime in regard it was the usage, and also for that by the company's said establishment the out-factories were themselves to render an account of all their receipts and payments, and for that purpose gave security as aforesaid to the company, and the plaintiff and council had the vouchers at cape Corssa castle when these sums were entered.

5. And as to the objection, that the out-factories, accounts themselves are not produced, the company by their letter dated 25 January, 1675, gave Mr. Hodgkin's order to take from the plaintiff and Eldin all their concerns; whereupon never having any order to bring them or send them to the company, and seeing the company's order, delivered up all the out-factories accounts and letters which were many thousands, to Hodgkins, who was proper to have them that he might see how matters stood; which papers were, since the plaintiff came to England, burnt by one Croxton, the company's late agent, with which the company being not satisfied, petitioned the Lord Chancellor for these accounts, who the 22d of March last ordered that the plaintiff should swear he left them with Hodgkins which should conclude the company, which the plaintiff had done. *Vide* order and affidavit.

[15]

DE TERM. SANC. HILL.

Anno Regis 31 & 32 Car II.

IN CANCELLARIA.

Bodly contra

Iniquity takes away equity.

Bodly gave bond of 500*l*. to the brother of the defendant, conditioned to pay to the defendant's sister (party also to the bill) 50*l*. and to maintain a base child paying a certain yearly sum for it. There was no place in the condition where the 50*l*. should have been paid. The plaintiff by his bill offers payment of the 50*l*. and brought it into court, and the defendant set forth by answer that the plaintiff was suter to her in

way of marriage, but abused her and left her, and thereupon the court refused to grant an injunction to the plaintiff against the suit on the bond; the plaintiff replied and acknowledged he was a suter, and really intended marriage, but that after he had begun to woo the woman, he was informed, as the truth was, that she had formerly been taken in a bed with another man, and that this was known publicly, and her father trepanned him to woo her, &c. he being a young man in Oxford. Yet now the Lord Chancellor denied the injunction saying, this court should not be a court to examine such matters.

Winkfield contra Combe. 1679.

[16]

F. Winkfield having a son and other children married the plaintiff's mother, and five years before he died made his will, and taking notice therein that his wife was enseint, devised 1000*l.* to the plaintiff; and if the child *en ventre sa mere* were a daughter, then she should have 1000*l.* but if a son, then that his executors should purchase 100*l.* per annum, and settle the same on the son and heirs male of his body, and if he died without such issue, to the plaintiff; the wife is brought to bed with a son who died in the life-time of the father, then the father died and his wife enseint with a daughter to whom no portion was left or other provision. And the plaintiff exhibits her bill to have the land purchased and settled on her, for if lands be devised in tail the remainder over, the devisee dieth without issue, the remainder shall take place, and there is the same reason here.

Chancellor. In case of a devise I cannot help where the law fixeth the estate, but if you come to have relief in equity and there falleth out an unseen accident, which if the testator had foreseen, he would have altered his will, I shall consider of it; here he meant in case he left a daughter born after his death, she should have been provided for; and though it happens that his wife had no such daughter (*viz.* whereof his wife was enseint at the time when he made his will, and to which daughter only the words of the will extend) yet here is the same in effect. A. having only a daughter devised his trustees should convey the land to the daughter in fee, the testator recovered and after had a son, the daughter shall not carry the land from the son. And now the Lord Chancellor directed a bill to be brought whereto the *posthuma* daughter should be a party, and both causes to be heard together.

Anonymus. The same day.

[17]

Where the agreement for a marriage, which shortly, *viz.* within seven weeks was had, but in the interim the young man had made addresses to another, but the agreement was

Unreasonable agreement not decreed.

reduced into writing and not sealed, and was extreme, that the daughter and her husband would have more than the father (indebted) and the mother, and two other daughters unpreferred would have left.

The Lord Chancellor did not decree the agreement, but if the plaintiffs could recover at law he would leave them to that remedy. It was referred to the parties to agree among themselves, else to attend again.

Elton contra Waite and Harrison. 18 Feb. 1679.

Agreement
of the hus-
band of the
executrix
binds not.
Executor,

The lady Anderson, grantee of an annuity for years, made her executor, who married Harrison, he being indebted to Waite and others, agreed with Waite to assign the annuity to him for security, and the grant of the annuity was delivered to Plucknet, a scrivener, to draw the assignment, but before it was perfected the executor died; the plaintiff took administration *de bonis non*, and sueth for the arrears the granter, and the other defendants for the deeds, and had a decree accordingly, though it was objected, that the husband had power to grant and alter the property; and this agreement was in equity, an administration, and the defendants had paid some of his debts in confidence of performance of the agreement.

Lloyd contra Philips.

Jurisdiction.

A decree in the Marshes to account, and the bill here to be relieved, because the witness is out of the jurisdiction; but upon demurrer dismissed.

Note.—Witnesses examined upon the account below.

[18]

Charitable
uses.

The Attorney General contra Combe. Friday, 27 February, 1679.

J. S. seised of land in fee by his last will in writing devised 10*l.* per annum for ever, (so long as there shall be a weekly sermon every Saturday in St. Albans, to be chosen by the greatest part of the best inhabitants,) out of all his lands in D. he being also seised of lands *pur autre vie*, as to the party who should have the 10*l.* 2dly. What lands should be charged with it, and whether the arrears should be paid because no sermon hath been had on Saturdays for many years, was debated; and the like for a lecture in Hamstead, &c.

It was objected that these bequests were not within the statute of 43 Eliz. which makes appointments to charitable uses therein mentioned good, and appoints them to be executed by the commissioners, and therefore are not good by the common law, if the devise itself, whereby they are raised, be not good, and here the devise is to no person, and part

of the land intended to be charged was but an estate *pur auter vie*, not devisable, and is devised no longer than while a sermon weekly, which hath not been there of long time.

Chancellor. So long as shall be, is so long as may be. 'Tis true, a lecture is not within the statute of 43 Eliz. but the statute of 43 Eliz. took pattern from 1 E. VI. made to take away superstition, and doth make use of the same expressions, when it is to advance true religion and charity, viz. given, limited, appointed, &c. *Summa est ratio quæ pro religione facit*. In this case there was charity, but it is charity mistaken, to be chosen by the greatest part of the best inhabitants, which is a wild direction, &c. He cited the case where a gift was to maintain a superstitious institution so long as the law would allow, turned, when the law did abrogate, that superstition to a good use, and decreed that the 10l. per annum should be to maintain a catechist there to be approved by the bishop; and the arrears from the time of the restoration of the king to be employed in purchase of lands to better the maintenance, and the lands *pur auter vie* to come in proportion with the rest; *vide* the order for the annuities to maintain lectures are thereby also decreed.

[19]

1. One charity devised another devised.
2. A void devise to charity not within 43 Eliz. decreed.
3. Lands *pur auter vie* devised to charity decreed though the charity not within 43 Eliz.

Perne contra Oldfield.

Chapman seised of the rectory of Crowland in Com. Linc. 2 Jac. conveyed the same to the use of such persons as should be lawfully appointed to serve the cure of Crowland forever.

Curate not
removeable.
Postea.

The church is impropriate *ab antiquo*, and no vicar instituted.

The statute of 18 Car. II. enables gifts, &c. to curates; the heir of the doner names Perne for curate; Oldfield is named afterwards and instituted, but it was *pendente lite*, but now said that there being several owners, &c. Oldfield was put in by another, and the plaintiff is revoked.

Chancellor. By the ecclesiastical law no man ought to be ordained *sine titulo*, that there might not be mendicant preachers; and I distinguish between curates where the church is become lay by impropriation, and where not; for the curate once put in and having a certain maintenance he shall not be dative and removable at pleasure, for that were to lay a foundation of simony for ever.

Quare. If this reason go not to bonds made to resign, &c.

Anonymous. 1679.

Money stopt
because land
evicted from
the purcha-
ser.
Covenant.
Eviction.

A. sells to B. with covenants only against A. and all claim-
ing by, from or under him. B. secured the purchase money,
but before payment the land was evicted, but not by any title
under A. but by a title paramount. B. sued to be relieved,
that he might not be forced to pay, seeing the land was
lost, and was relieved by the Lord Chancellor *ex relatione*
Churchil.

[20]

Note.—1st. If declaration at the time of the purchase
treated on, that there was an agreement to extend against
all incumbrances not only special, it could not have been ad-
mitted.

2dly. The affirmative covenant is negative to what is not
affirmed, and all one as if expressly declared, that the vend-
er was not to warrant but against himself, and the vendee to
pay because security absolute without condition.

3dly. *Quare.* If this may not be made use of to a general
inconvenience, if the vendee, having all the writings and pur-
chase, is weary of the bargain, or on other respects sets up a
title to a stranger by collusion.

Nota.—In many cases it may easily be done, &c.

Blackston contra Moreland. 1 March, 1679.

Mortgage.

Porter had an annuity charged on the manor of, &c.
Moreland had an estate in the manor liable to the annuity ;
Blackston had an estate subsequent to both by way of mort-
gage; Moreland having no notice of Blackston's interest
treated with him in the reversion in fee, who desired to bor-
row money of him, and thereupon he agrees and purchaseth
Porter's interest, and for that and money lent to the rever-
sioner, buys in Porter's interest, and pays 900*l.* part to Por-
ter; and part lent to the reversioner, there being no more
than 500*l.* due to Porter.

The question was, whether between Moreland and Black-
ston (who now exhibits his bill to pay off Porter and More-
land their debts,) he should pay more than was due to Porter,
more than 500*l.* and the mortgage money due to Moreland.
He is decreed to pay the whole 900*l.* but otherwise if More-
land had notice of Blackston's incumbrance.

[21]

*Grosvenor Plaintiff, and Cartwright, Administratrix of Thomas
Cartwright, Defendant. 3d March 1679.*

Resolved and decreed by the Lord Chancellor.

Interest.
Executrix
calls in and

An executrix or administratrix receives in money, which
was secured to the testator, if she lend it out to profit, she
shall not account for the profit, for she lends the principal at

her hazard, so that if it miscarry she shall make it good to the estate. receives a debt well secured, she shall not pay interest, tho she lends it out on profit.

A difference was endeavoured to be put on this rule, viz. that where the debt was paid in by the creditor without her compulsion, there she should not answer profit made by lending it out again; but where the money was lent by the testator on good security, and such security continued good, and the executrix calls in the money and lends it out again, that there she should answer the profit she made; for it was her voluntary act, and is in effect to deprive the children of the benefit of the money, till the infants come of age, and turn it to herself, which being for a great sum, as in this case it was for many thousand pounds, will be great gain to the executrix, and loss to the children for whom in effect she is trusted; this was earnestly pressed: but

The Lord Chancellor. It is a fixed rule of the court, and I will not change it; but she shall forthwith discover what moneys she hath, or hath received of the estate on such security or otherwise, and for the time past she is not to be charged, but shall hereafter lend none of the money without leave of the court; and such moneys as she hath lent she shall discover the securities to them, and if they like them, and so declare their acceptance, you shall have the future profits of the money lent, else not.

If the plaintiff reply to an answer, and without rejoining and giving rules for publication, bring the cause to an hearing, the answer shall be taken wholly true as if there had been no replication, for the opportunity which the defendant hath to prove his answer is taken from him. The course of the court.

Simpson and Field. 3 Martii, 1679.

[22]

The Case.

J. S. was indebted to J. D. by bond of 1,000*l.* to perform an award; by the award was due 250*l.* to the obligee. J. D. put the bond in suit against J. S. A bill is exhibited here to be relieved against the suit, and an injunction awarded on recognizances to abide the order on hearing. Field and the obligee are bound in the recognizance, which was penned to pay what should be reported due by N. H. a master named in the defeazance or condition; but the master died before any report made, and so also did the obligor, who died intestate worth nothing: by the strict penning of the defeazance the recognizance is not suable at law, because no report was made by the master. The obligee, because he could not proceed in the cause without reviving the suit, which was abated by the death of the obligor, who was one of the plaintiffs in the bill, procured administration of the

A surety not bound by law shall not be bound in equity.

obligor to be taken in the name of a poor fellow, and in his name revived the cause, and brought the cause to an hearing, and a reference to a master to take account of the just debt, who reported 300*l.* due.

The question was, if the sureties should be charged : it was objected that this is a manifest fraud and practice of the obligee to bring a charge on the surety, who was not bound by law ; and the practice is plain, for the reviver is by the administrator, which no man would do to charge himself ; but this was answered and every day done when a cause cannot proceed for want of parties, viz. administrator, &c. to take administration, &c.

But the great question was, if the surety, who was not liable in law, should be made liable in equity, for the plaintiff had good remedy for a just debt, and justly proceeded to recover it ; but the court staid his suit, and takes ill security, which proves so, and the debt lost thereby, and therefore the court is bound to do us right ; and the intent of the court was, that the debt, if due, should be secured ; and the intent was not with reference to this or that master's report, for suppose that the court had during the life of the parties transferred the references to another master, and he had made a report, that should have bound ; and in case of a bond lost this court have made a surety to pay it. Yet the Lord Chancellor contra ; for the party is but a surety not bound by law.

[23]

Bromley contra Hamond. 4th March, 1679.

Mortgagee lends more money on a second mortgage, the first being bad.

The father and mother tenants for life, the remainder to the son in tail by marriage settlement, on great consideration, the father and mother mortgage the lands to J. S. in trust for one marshal a scrivener ; the father, as was alleged, made oath before the mortgage that he was seised in fee ; the father died, marshal doubting or finding his security bad, gave 20 to one to procure the son to borrow 100*l.* of him, but did not at all discover that the 100*l.* was his ; the son did borrow the 100*l.* and mortgages his lands for it, and this was conveyed to J. S. who had the father's mortgage, and the 100*l.* Not being paid a bill is exhibited to foreclose the son of redemption, which was decreed ; then Dr. Mills purchaseth by way also of mortgage ; the son after the day appointed by the order to pay the 100*l.* renders it with damages, but was refused. The decree was inrolled, but that was done with such speed that the advantage thereof was waved.

And now the matter insisted on was, that the first mortgagee having a defective assurance, now having gained a good title in law to the lands, and the plaintiff having no title at

law ought to redeem both mortgages, and pay the money of both mortgages, or not to redeem it at all : as in Sir John Fagg's case, who having purchased on a defective title for a small sum, obtained into his hands the deed of intail against him.

Chancellor. The son is a stranger to the father, and all one as a stranger, and differs from Fagg's case, and decreed a redemption on payment of the 100*l.* damages and costs. The mortgagee did oppose the redemption by his answer ; but as to the practice in gaining the second mortgage it is not material, for he did nothing but to secure a just debt. Costs.

Axtel contra Axtel. 4th March, 1679.

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The Case.

The husband devised three tenements, and one called Cox's tenement, to his wife in satisfaction of her dower, with election to her to take one or the other, the dower or the legacy; afterwards he sold Cox's tenement and died without new publishing the will. The wife insists to have satisfaction for Cox's tenement, because her husband gave her that with the rest as in satisfaction of her dower to which she is entitled. And the plaintiff cannot bar her of her dower by the will ; but the lands devised are but church-leases. And (said her counsel) she asketh nothing of the court, but that she may have only what the law giveth her. Election.
Devise.
Eviction.

Chancellor. She must take the will as it was at the time of the death of her husband, for till then it is no will ; let her choose one or the other, she may not have both ; and decreed accordingly.

DE TERMINO PASCHÆ

[25]

Anno Regis 32 Car. II.

IN CANCELLARIA.

— — contra *Wilkinson. 1 May, 1680.*

J. S. seized of lands and houses in fee, by his will in writing deviseth to A. lands of 100*l.* per annum in fee, to be set out by his executor, and 5000*l.* to one kinsman, and 3000*l.* to another, and dieth. The executor sets out to A. lands for 100*l.* per annum, which were worth more, and thereby the lands and houses left are not sufficient to pay the 5000*l.* and so forth. The legatees exhibit their bill to avoid the setting out of the lands. Account of
legacies in
proportion.

The defence made against it was, 1st, that the devise of the lands was a specific legacy, and consequently not to come in average with the other legacies.

But the Lord Chancellor decreed, that it was not a specific legacy, but *quantitatis*, and therefore if there were not sufficient, each should bear his share in the loss. But then it was objected, that it was not practicable in this case, because that A. had for valuable consideration alienated some part of the lands.

The Lord Chancellor decreed, that Sir J. C. a master of the court, examine the value of the lands and houses, what they were worth to be sold at the testator's death; and if A. had more than his proportion of the whole value, to pay for it.

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Ebrand contra Dancer. 7 May, 1680.

The grandfather takes bonds in the name of his children, being infants, the father being dead.

Chancellor. There is difference in the case, where the father is dead and where he is alive; for when the father is dead the grand-children are in the immediate care of the grandfather, and if he take bonds in their names, or make leases to them, it shall not be judged trusts, but provision for the grand-child, unless it be otherwise declared at the same time; and decreed accordingly on that reason, though there were other matters.

Admiralty.
Merchant.

Nota.—Eodem die 7 Maii, ex relatione Mr. Finch, solicitor. A ship broke the ship of Is. who sued in the admiralty the ship for recompense: J. D. became bail for the ship in the court of admiralty; whereupon the ship being discharged, was sold to the defendant: the surety in proceeding was condemned in the admiralty; he sueth here to be relieved and dismissed: *ex relatione* Mr. Finch, solicitor-general.

Thomas, &c. contra Lane, widow.

Jeffery Thomas had four children; John, his eldest son, father of the plaintiff; Grace, married to Lane, deceased, Elizabeth and William: and by his will devised his part of a house in Exon to Grace, and other houses; one to Elizabeth, another to William, with this clause, that if any other of his said children died, his part should go to the survivors. He died: John, Grace and her husband, and William, came to an agreement with John, which was executed by writing and possession accordingly, near twenty years. John devised the lands to raise portions for two of the sisters; his daughters were paid their portions; the plaintiff is the third, and sueth to have the agreement stand; for Lane, the widow, sued at law, and recovered part of the lands, which by the death of John accrued to her, Elizabeth and William. The decree concerned Lane only, because of her coverture at the

time of the agreement. The case as to her, that by the agreement, whereas the house, viz. a part of it was devised to her only for life, John was to convey it and a garden, and curtilage adjoining to her for her life, remainder to her daughter Rebecca for her life by deed; and a covenant in the same deed to estate the husband of Rebecca or her first child therein also after her and Rebecca; and though the agreement and execution thereof could not bind her, yet she after her husband's death having entered into the house, and also the garden and curtilage, (which was not devised to her, for though a messuage devised will carry a garden and curtilage, yet the devise of a house will not, especially being devised without the words *cumpertin*, or the like,) hath now since she became sole, consented to, and taken the benefit of the agreement made during her coverture.

The defendant answered, that the addition of the estate to her daughter, &c. and his entry into the house and enjoyment of it, could not bind her, nor conclude her consent to the agreement, for she had title to it by the will, for it is the same which was given by the will, and no more; for the garden is but a small piece of ground, but a poll, and no passage to it but through the house, (as the counsel said.)

The Lord Chancellor dismissed the bill, but ordered that no benefit be taken of the agreement, or deed made thereon by Grace or Rebecca, (who was one of the defendants,) because Grace is not to be bound, being covert, and cited the case 7 E. IV. the wife received money during the coverture.

Sidney contra Earl of Leicester.

Leicester-house, on the marriage of the now earl of Leicester, then Lord Lisle, with the daughter of the earl of Salisbury, was settled on Robert, late Earl of Leicester, for his life, remainder to the now earl for his life, remainder to the first, second, &c. sons of the now earl in tail, &c. The marriage took effect; the now Lord Lisle, first son, is born. Earl Robert makes several contracts with divers workmen to build on Leicester-fields, near the house, and in part settled before, and leases for 42 years, (whereof now 14 are expired,) were made accordingly; but after the buildings were begun and proceeded in, the builders began to leave off, because they had notice of the settlement. Earl Robert thereon writes to his son, the now earl, for his consent that the buildings might proceed, and that he would consent; for the ground before the building was but 4*l.* per annum, and the rent at present during the leases is raised to 53*l.* per annum, and by improvement after the leases, will be 2000*l.* per annum. The consent of the now earl was proved, and he is

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Consent verbal obliging.

decreed to confirm the leases, though the consent was but verbal, and said it was for the benefit of the family.

But whether the Lord Lisle, who was in remainder in tail, should be decreed to confirm, the Lord Chancellor would advise.

He acted and did negotiate between his father and grandfather to procure his father's consent not only during his non-age, but also after his full age.

Hele contra Hele. 1680.

Agreement
for jointure.

The plaintiff, widow to H. Hele, sued for her jointure; the bill was founded on an agreement, whereby for 3000*l.* paid in money, viz. 2,300*l.* and 700*l.* by assignment of bonds, H. Hele covenanted to settle 300*l.* per annum in lands for her jointure, and 40*l.* per annum rent was granted to her before marriage to bar her of dower; but this was only in proof, not in the bill.

The defendant by answer sets forth, the will of Samuel Hele, elder brother of Henry, whereby he devises his lands to Henry for life, remainder to first, second, &c. sons of Henry in tail successively, the remainder to Richard, a cousin, in like manner, with remainder to others in like manner; but in the will a power was given to Henry to limit the capital messuage and lands which are called fleet, to any wife; but he executed not this power, and whether that Henry dying before any execution accordingly, the court should decree it, it being a new case, the cause was put off till another day.

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Mortgage
party.
Executor.

Meeker contra Tanton. 10 May, 1680.

The bill was against the heir of the mortgagor to have payment, or whole without redemption; and because the administrator of the mortgagor was not made party, the cause being opened at hearing, the plaintiff could not be admitted to proceed, for in all mortgages the money must go to the executor or administrator, and not to the heir.

Elliott and Hele contra Hele. 11 May, 1680.

Power not
executed.

Elliott, father of Hele, the other plaintiff, set forth, that Sir Henry Hele seised in fee of divers manors, &c. in Com. Devon, Cornwall and Somerset, in consideration of a marriage with the plaintiff Hele, and 3000*l.* did agree to settle lands of 300*l.* per annum on the plaintiff for her jointure, and the 3000*l.* paid and secured, and prays performance.

The defendant sets forth, that he knew not the agreement, but said he claimed not under Sir H. Hele, but by the will of Samuel Hele, elder brother of Sir Henry; who by his will

devised the lands in such manner as thereby appeareth, not showing how, but that the plaintiff could have no jointure, saving that some lands did descend to him in fee.

The cause coming to be heard, was thus, viz. Samuel Hele, elder brother of Sir Henry, seised in fee of divers manors, and *inter alia*, of Fleet Damarel, Capel Messe, &c. devised all (except some parcels) to Thomas Carew and others in fee, on trust to raise 10,000*l.* portions for his daughters and pay his debts; and this by sale of all or any part, and by leasing as they should think fit, and after for Sir Henry his brother for life, the remainder to his first, second, and third sons successively, and the heirs male of their bodies, and to the defendant Richard Cousin for life, the remainder to his sons and their heirs male, &c. Item, I appoint, devise, and give to Henry power to limit and appoint Fleet Damarel, &c. to my wife after the death of Amy, (who *revera* had a former jointure therein, and died before the plaintiff's marriage, but nothing was said of that at the hearing) Sir Henry after the death of Samuel agreed *prout*, but died within three quarters of a year.

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The first question was, if the plaintiff could be relieved out of the power, for else there was not sufficient for 300*l.* per annum?

The Lord Chancellor inclined strongly for the plaintiff, in regard of the consideration, and because Henry had power by the will to have done it, and was express, that if he had *de facto* done it, and missed in time or other circumstances to have done it well, the defect should have been supplied, for circumstances in such case are only put into such powers, to the end that no fraud or falshold should be imposed, and cited the Countess of Oxford's case, so decreed by the Lord Elsmere, and another case; and said that the *Stat. de donis* was an ambiguous act; and at the bar it was observed that the will gave no estate to Henry, nor estate tail to his sons, but the estate was in the trustees, and a trust for Henry, which is under the power of this court, and trusts in tail are not favoured Power. in this court. And it was also said, that the non-performance by Henry ought to be excused, and not imputed to the plaintiff's prejudice; for the death of Henry happening so soon after the marriage, that accident being the act of God, prevented him, and accidents are a proper object of relief.

But after some debate, Churchill for the defendant moved, Equity bat that if the plaintiff have right, yet she hath no bill for it on no bill. this case, for she hath set forth a seisin in fee, and not the power; and of that opinion the Lord Chancellor was. And thereupon the plaintiff's counsel prayed, that they might amend the bill, which was granted, paying the costs of the day.

DE TERM. SANCT. TRIN.

Anno Regis 32 Car. II.

IN CANCELLARIA.

Perne contra Oldfield.

Curate ecclesiastical.

The church of Crowland in the county of Lincoln, being appropriate to the abbey of Crowland, and no vicar endowed, (for ought appears it seems that the cure was served by some of the monks,) the rectory came to the crown; and by mean conveyances to one Mr. Chapman, who gave the rectory by his will to the maintenance of a minister there for ever, reserving not the nomination of a minister there, nor expressing any thing concerning such nomination, the devise of the rectory being void at common law, being made to no certain person. The estate thereof came to Sir Thomas Orsby and Wingfield, who did appoint and nominate the defendant Oldfield to be minister and serve the cure; afterwards the plaintiff, supposing a lapse to the crown, was presented, instituted and inducted, as if the church had been void. Orsby and Wingfield rectors, supposing that the nomination of the minister belonged to them, nominated Oldfield: Perne sued the rectors for tithes off fen-lands improved lately, and gained from the water. They pretend a *non decimando* under the abbey: and that Perne the other defendant was not minister; so he pretended that the tithes belonged to him.

Tithes of Fen-Land improved.

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For the plaintiff it was said, that here is a pious use wholly subject to this court; and that Perne coming by the ordinary, though he was not parson or vicar, was allowed by the bishop, and decreed accordingly that he should have the tithes; but as to the *non decimando*, a trial, &c.

Williams contra Day. 18 June, 1680.

Executrix.

The plaintiff Rebecca complains, &c. the case on the bill was, that the defendant, executrix of her husband, sued her as executor of Roger Win, with Robert son of Roger, and co-executrix with her, for a debt of 400*l.* principal, due by bond: that Roger a mercer, dying, the plaintiff was sick and unable to manage the estate. Whereupon Robert entered into the shop, paid book debts, (for advantage of the trade, which he continued, whereby the estate was wasted as to creditors by bond;) and there being leases for years of good value, and great debts by bond, the plaintiff and Robert agreed that those leases should be sold, and the money paid to Robert, and he to pay the money to creditors by bond. The plain-

tiff joined with him in the sale, and he received the money, paid it to creditors by bond, and complains that in a trial against her in debt brought on the bond, whereto she pleaded *plene administravit*, the payments of the bond made by Robert in discharge of her, was not allowed by Sir William Scroggs, chief justice, unless that she would stand in Robert's place, and be chargeable as he was, and by consequence with the *devastavit* committed by him, whereto she ought not to be liable. The trial proceeded not to a verdict, but a juror withdrawn, and now she prays relief.

Land is mortgaged to A. then to B. then to C. If A. sued to redeem, and try his debt by decree, C. A. and B. shall be bound by the account which A. made in his suit, and pay or contribute to the charges of suit; if made without fraud or collusion. *Vide ante*.

Account binds one not party to it. Mortgage.

The Lord Chancellor declared, that he would stop pulling down houses, or defacing a seat by tenant after possibility of issue extinct, or by tenant for life, who was dispunishable of waste by express grant, or by trust.

Jason contra Eyres, Domin', and Eyres contra Jason.

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14 June, 1680.

Sir John Hanmer seised in fee of the manor of Great Hinton, &c. mortgages the same to Sir Tho. Skipwith for 7,000*l*. and forfeited it; the same was afterwards conveyed to Ann Fisher and her heirs on agreement, that if Sir John Hanmer or his heirs paid 4,000*l*. with interest, the lands should be reconveyed, otherwise to be absolute.

Mortgage notwithstanding particular agreement, e contra.

The money was not paid, then Sir John Hanmer and Ann Fisher agree with Sir Robert Jason, father of the defendant Jason, for the sale of the premises for 11,500*l*.; 7,000*l*. was paid, and the lands conveyed to Sir Robert Jason, the father and his heirs, the 4,000*l*. and interest was still chargeable on the land. Afterward there was a treaty of marriage to be had between Sir Robert Jason and the complainant dame Ann, and by articles, 1674, it was agreed, that 2,100*l*. should be paid to Mr. Fisher towards that debt, 1500*l*. whereof being the portion of dame Ann, was paid, and 600*l*. more by Sir Robert Jason, by which the debt was reduced to 1900*l*. principal-money, for securing whereof a lease for 500 years was made of the premises to Travers and Finch, defendants, &c. And is provided for payment of the said 1900*l*. with interest, viz. 57*l*. on the 25th of December, 1674, and the 25th of June, 1675, other 57*l*. and 1957*l*. on the 25th of December, 1675. And that afterwards the said Fisher should join with Sir Robert to convey the premises to Carew and Holbech, and their heirs, to the use of Sir Robert for life, the

remainder to dame Ann for her jointure, and in full of dower. The remainder to the defendants, Carew and Holbech, and their heirs in trust, that if Sir Robert, the father, should pay the said 1900*l.* with interest as aforesaid, amounting to 2.700*l.* if he should so long live. Or otherwise, if he should within three years after the date of the last conveyance, bearing date the 19th of June, 26 Car. II. if he should so long live, pay the said debt on the said lease, and procure the same to be surrendered; to the intent that if the complainant dame Ann survived him, she so long as she lived might hold the premises discharged of the same; then the said Carew and Holbech should be seised of the premises to the use of Sir Robert and his heirs.

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But in case failure of payment was made, or that Sir Robert, her intended husband, should die before payment and surrender of the said lease; in either of the said cases the said John Carew and Holbech, and the heirs of the said survivor, should stand seised of the reversion to them limited, in trust for the said complainant and her heirs, not only to enable her to pay the said debt, and free her jointure thereof, but to the end she might enjoy the inheritance for increase of her fortune, according to agreement between her and the said Sir Robert; and that then they should convey the same as she, (during coverture or sole,) or her heirs should direct.

28 March
1772.

Sir Robert Jason died; Jason, the defendant, being his heir, Ann, his relict, after married Sir Christopher Eyres, the plaintiff; and there being a former incumbrance not taken notice of to Mr. Hodges of 1000*l.* Sir Christopher Eyres paid that 1000*l.* with damages.

On this case cross bills are exhibited by Sir Christopher and his wife, to have the inheritance; and by Jason to have the inheritance, he paying the debt.

1st. At the hearing on Eyres his part, it was pressed as the express agreement, that the wife should have the inheritance, the debt being not paid, nor lease surrendered.

2dly. That it could not be a mortgage as to Ann, the wife, though the lease was a mortgage to Fisher.

3dly. If it had been meant to have been a mortgage, the power of redemption would have been limited to the heir as well as to Sir Robert, the father, which was only limited to the father, and not to his heir.

4thly. There was reason for so doing, because the whole portion was expended in reducing the debt, and so till payment of the debt she would be without any profits of her jointure.

5thly. The cause being foreseen, it was expressly agreed, that the reversion in the trustees settled should go to the

complainant and her heirs, not only to enable her to pay the debt and free her jointure, but to the end she might enjoy the inheritance for the increase of her jointure.

1. But the Lord Chancellor decreed it a mortgage, saying, that if the father, Sir Robert Jason, had lived after three years, it could not be denied but he might have redeemed it.

2. That no mortgage by any artificial words can be altered unless by subsequent agreement.

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3. That divers proofs touching parol declarations were offered and read on both sides, of which the court would take no notice, but rejected.

Anonymus. 8 July, 1680.

The Case.

A. took a statute for payment of 200*l.* lent, but finding a former incumbrance for other 200*l.* to B. did purchase B's estate; then discovering another mortgage made by Dicklemere to C. for 500*l.* purchased in that also. But Dicklemere, who made all these incumbrances, did make another to the plaintiff subsequent in time to the first mortgage for precedent, but proceeded to the two last. and this mortgage. The bill is, that he may pay off the 500*l.* mortgage so to be let in, &c.

The question was, whether he should be admitted without payment of all, viz. the two latter? and decreed he should not unless the first 200*l.* man had notice, &c.

Eodem die Linch contra Cappy.

Cappy, executor in trust for Linch in remainder, after the testator's children, or other nearer kindred to the testator than Linch was, of the *residuum* of the testator's estate, and after for Linch in case they died as they did. Linch now sues Cappy for an account. The question was, whether Cappy, who did receive great sums of money of the testator's estate, and put out the money again at interest, and received interest for the same, should answer the interest so made and received by him? And on much debate it was decreed he should not.

Lord North
in his time
declared
e contra hic.

Interest.
Executor.

But then it was insisted on, and it was true, that Cappy had annexed to his answer an account of all his doings, wherein he brought to account the interest as well as the principal, and therefore had adjudged the case against himself. The counsel *e contra* answered, he could do no other; for the bill requires his answer to the whole transactions,

The Lord Chancellor. Did he offer to pay the interest as well as confess the receipt of it? No; and therefore pronounced for the defendant as before. But some proposition of an expedient was then offered and accepted.

Anonymus. 13 July, 1680.

Freight.

Refusal.

Merchant.

Admiralty.

A part owner of a ship sued the other owners for his share of the freight of the ship which had finished a voyage; but the other owners did set her out, and the plaintiff would not join with the rest on setting her out, or in the charge thereof; whereupon the other owners complained thereupon in the admiralty, and by order there the other owners gave security that if the ship perished in the voyage, to make good to the plaintiff his share; and if she returned, to restore his share, or to that effect. And in such case by the law-marine, and course of the admiralty, the plaintiff was to have no share of the freight. It was referred to Sir Lionel Jenkins to certify the course of the admiralty, who certified accordingly; and that it was so in all places, and otherwise there could be no navigation. Whereupon now the 13th of July the plaintiff was dismissed.

Fashion contra Atwood. 19 July, 1680.

Agreement.
Assignment.
Executor.

Pearson, living in London, was agent and factor for Atwood, now deceased, to sell Norwich stuffs in London, which Atwood sent him from Norwich. And in the management of this trade, Atwood charged Pearson with bills of exchange; and it so fell out that Pearson had sold in Atwood's name divers cloathes for money payable at future days; and doubting he had not goods in his hands to make good what he had undertaken by accepting Atwood's bills, informs Atwood of it, and Atwood agrees that Pearson secure himself out of what effects, &c. he had. At this time Atwood was indebted to Eborne, and others, by bond; and Pearson was likewise indebted to others on his own account. Pearson by word assigns to his creditors the debts which were due to Atwood; Atwood and Pearson both die. The administrator of Pearson, and the assignees of the debts due to Atwood, but assigned by Pearson to his creditors, sue the executrix of Atwood for to have the benefit of the debts due to Atwood for his goods sold by Pearson, but assigned by Pearson to his own creditors.

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The question was, whether the assignee of the debts by parol made by Pearson, and the parol agreement of Atwood, that the goods and debts which Pearson had and contracted for, should be his security for his undertaking for Atwood, should prevail against the creditors of Atwood, especially such

creditors of Atwood as had bonds ; for the persons who had bought Atwood's goods of Pearson did know that the goods were Atwood's; and not Pearson's, and entered in Pearson's books as debts due to Atwood not to Pearson ; and thereupon we of council with the executor of Atwood, and the creditors of Atwood by bond insisted :

1st. That the goods were sold as Atwood's goods, and the buyers entered in Pearson's books as a debt to Atwood, Pearson had no remedy on the contract ; but Atwood was solely owner of the debt.

2dly. That the debt being a thing in action, is not transferable by law ; so as notwithstanding the agreement of Atwood, he still in law remained creditor ; and this is a case between actors and transactors in England, not of merchants, who by law merchant may assign debts.

3dly. That though in equity Pearson might retain, or be entitled in equity to the debt against Atwood himself ; yet now the case is changed by the death of Atwood, for now the creditors of Atwood by bond are in a better case than Pearson, who had no title but by parol ; and if Pearson would sue the executrix of Atwood, she could not pay him ; but if she did she should commit a *devastavit*, and break her oath as executrix ; and the assignees of Pearson could be in no better case than Pearson and his executors were.

Devastavit.

4thly. The creditors of Atwood by bond had a good title in law to be satisfied out of his estate and debts, and they had done nothing to prejudice that title : and the case is not the same, for the goods remaining unsold as for debts.

The Lord Chancellor. By the agreement Pearson had a good title in equity to the debts, which in equity are become his, and are no longer Atwood's ; and therefore decreed for the creditors of Pearson.

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Methinks there was another equity for Pearson, but was not mentioned or insisted on, viz. that in case of merchant and factor, the merchant should not have account from the factor, but if the factor were out more than could be demanded from his factor, (as in this case it happened) the merchant should first make even.

Anonymus. 20 July, 1680.

Two drapers entered into articles of copartnership, each brought in a 1000*l.* stock, there was no benefit of survivorship, neither to become indebted without the other, neither to take out of the stock without the other : one became indebted 100*l.* without consent of his partner, made his wife executrix and died ; his wife confessed judgment for the debt, the other sues for account and relief against the creditor and the wife ; they confess the articles, and obtaining the judgment.

Joint traders.

And 20 July 1680, on debate, the Lord Chancellor granted an injunction against the judgment, because the debt related not to the partnership, saying, if this shall be suffered no trade could be in such case. Mr. Solicitor cited Atwood's case *prox' ante* 36.

Eodem die.

Solicitor received the plaintiff's money without his knowledge.

The plaintiff having a decree for money, the plaintiff's solicitor without order from the plaintiff received the money; the plaintiff knowing nothing of it prosecuted again. On complaint the solicitor was ordered to pay back the money, with interest, costs and charges.

But as to the plaintiff, the Lord Chancellor allowed the payment good, and bid the plaintiff if he would, take his remedy against his solicitor.

Anonymus. 12 January, 1680.

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The wife's answer not prejudice the husband. *Testis singularis.*

The wife executrix to her husband, married a second husband. A bill is exhibited against them to discover the trust; the husband and wife disagreed in the matter, and put in severally their answers; the husband denied the trust, but the wife confessed it. The cause proceeded to hearing, and the plaintiff proved the trust only by one witness, which the plaintiff insisted on with the wife's confession, to be sufficient; the matter being but in that wherein she was concerned as executrix. But the bill was dismissed, *quia* the wife's answer shall not bind the husband, *ex relatione* Sir J. Churchill and Serjeant Rawlinson.

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DE TERM. SANCT. HILL.

Anno Regis 32 & 33 Car. II.

IN CANCELLARIA.

Balch contra Tucker. 24 January, 1680.

Trial directed on a point not in issue.

An agreement was made under hand and seal, that Balch was to pay A. S. her debts being 300*l.* and she was to dispose by her will any sum of money not exceeding 200*l.* and A. S. being seised of an estate for lives, to her and her heirs, of the rectory of Huish; it was agreed, that if she had a child, the child should have the rectory after her death, but if the child died, the plaintiff Balch was to have the estate. This agreement was made in order to a marriage between the plaintiff and A. S. The marriage took effect, the child died, A. S. made her will, and thereby gave 150*l.* in money legacy, and died. The defendant her heir, brought an ejectment for the rectory, and recovered it by verdict as he must do, there being

no estate yet passed. Balch exhibits his bill, sets forth the agreement, and prays execution, paying the legacy and the debts. The defendant by answer, positively denies the agreement: the cause went to proof and hearing; the plaintiff proves the agreement fully; the defendant examined one witness to prove that the morning before the marriage A. S. was troubled and wept, and declared to him that the reason of it was that she would not marry unless a writing which she had made to her husband might be delivered to her again. Whereupon a writing was delivered to him, and he delivered it to A. S. the husband saying she should have any thing so she would marry him. The marriage proceeded, the cause coming to be heard, the court ordered a trial upon this point only, viz. whether the agreement were waved? A trial was had, and found for the defendant that the agreement was waved. The plaintiff moved for a new trial, and was denied, and an order to dismiss the bill; and now the plaintiff moved again for a new trial, or that the cause may be re-heard. J. offered it to the court, that the direction for a trial at first was hard upon us.

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The question only upon bill and answer was agreement, or not: nothing in issue, whether the agreement was discharged, for that was quite contrary to the issue; and if the witness swore never so false, he is not perjured, and it is impossible for the plaintiff to disprove the allegation of a defendant, which the defendant never alleged; and it seems a piece of artifice to make that a defence of which the court can never give judgment, (when a thing is not alleged:) the court must judge *secundum allegata & probata*; but by this way the force of an evidence proper for the court, shall be judged by the jury, and not by the court; for in this particular case, if the deed itself had been delivered up, yet it is no discharge in law except it had been cancelled: if it be granted that the very deed was that which she desired, which yet he did not prove, for he, viz. the witness, swears he cannot write nor read, nor tell what it was that was delivered; yet it can amount to no more than that she desired to have it in her power to destroy it, which she never did; for it is proved the husband had it after her death: and if the defendant be too hard for us in the form of proceeding, coming so late, we have more of the strength of the cause on our part in point of substance.

The court said we came too late, and would do nothing in the motion.

Note.—The court directed this trial not upon a deed shown, but upon matter of fact.

Juzon contra Morris. 8th February, 1680.

Surrogate
deputy within
the stat. E. 6.

An officer within the statute of 5 Edw. VI. (as I take it a surrogate) makes a deputation of his office, rendering there-out 90*l.* per annum, and exhibits a bill to have an account.

The defendant pleads, that the deputation is void by the statute, and ought to have no account, it being in effect a farm within the statute.

Vide Lock-
ner and
Strode, ante.

Curia. After long debate the plea was allowed.

Comes Banbury contra Briscoe. Eodem die.

Deed
brought into
court for use
of each party.

Great settlement was made of the estate of the earldom, consisting of divers manors. Parcel of the land on good consideration was settled, under which Briscoe claims, being a security for 6,000*l.* and the deed of the grand settlement delivered to Briscoe, or those under whom he claims: the rest of the manors, &c. came to the plaintiff, who exhibited his bill to have the deed of settlement, offering in his bill that Briscoe shall have a copy attested by the court.

Briscoe pleads his settlement, and that he cannot make any title without the grand settlement, and therefore keeps it; but offers to the plaintiff, that he may have a copy of it attested, and that he will produce the deed on all occasions at the plaintiff's cost.

Upon hearing the plea the Lord Chancellor said, if tenant for life have a deed, whereby the reversion and inheritance is in another, he may at law detain the deed against the reversioner; and ordered, that the settlement shall be brought into court for its safest custody, and both parties have the use of it as they have occasion: and both parties if they please shall have copies attested.

Knight contra Cooke. Eodem die.

[43]

Mistake in a
conveyance.
Copyhold.

J. S. seised of the reversion after an estate for life, of divers copyhold lands, and two acres of free-hold lands, which free-hold lands were in the possession of Ralph, and the rest in A. B. C.

J. S. assigns to J. D. and surrenders the copyhold, and J. D. assigns the two acres of free-hold to the plaintiff, and *inter alia*, the copyhold in the tenure of James.

These assignments were on valuable consideration; the bill charges that this was a mistake, James being named for Ralph; and that the true intention of the parties that made the assignment was, that the copyhold in Ralph's tenure was to be assigned, and that James had no copyhold there, and therefore must needs be intended that Ralph had; because James had none, James and Ralph having both the same sur names.

It was alleged, that the assignment and possession had been 20 years ; but after it appeared that it was but 4 years since the tenant for life died.

The Lord Chancellor inclined at first against the plaintiff, but at last declared that the copyhold could not pass but by surrender only, and not by conveyance.

Colston contra Gardner. Eodem die.

The Case was.

The plaintiff exhibited a bill for an account of a personal estate, and an account was decreed, and referred to a master to take the account ; exceptions were taken to the account, and referred back on one exception. In the interim the defendant having had a treaty for the marriage of his son, but nothing concluded ; he did by deed in consideration to enable his son to make a jointure in case he married, and in consideration that his son had undertaken to pay his debts, amounting to 1700*l.* settle all his lands upon his son and his heirs, the lands being of far greater value, viz. many 1,000*l.* and the creditors were no parties to the deed, and in the deed a power of revocation reserved to the father in case the son should die without issue. This was done before the master made his second report ; and the second report varied but 11*l.* from the former, being about 400*l.* due upon both reports : process of the court was pursued to a sequestration against the father and his assigns, the son being taken up on attachment for disobeying the sequestration ; but being examined, excused himself by the title aforesaid.

Account of a personal estate decreed and referred to a Master.

[44]-

Sequestration.

The question was, whether the son was liable to the sequestration in this case ? Which was much debated by counsel on the son's behalf.

1st. Because there was no land demanded by the bill only on account of a personal estate.

2dly. Because at the time of the alienation the account was not ascertained or adjudged, and the case of an outlawry was just ; the party aliening after the outlawry, his land was not subject to it in the hands of the alienee. And

3dly. The sequestration was for the contempt, not for the duty.

The Lord Chancellor took time to advise on the case, and now, 8th February, 1680, delivered his judgment, and said, he would explain himself for learning and use.

He observed that the judges at the common law were severe, and unwilling to support or assist the proceedings of Chancery : and therefore he would cite some cases and proceedings against the proceedings in Chancery first, and then apply them to the case in question.

Object. 1. That this deed or settlement was made between father and son only, and the friends of the son's wife, nor wife, no parts to it: and all the estate the father had in the world was conveyed to, and settled upon the son in consideration of this marriage to be, and 1700*l.* to pay his debts.

2. That a sequestration does not bind till laid upon it, or at least not till ordered.

At common law a man may convey away his estate before outlawry.

[45] And then the Lord Chancellor cited these cases at the common law, as follow :

41 Jac. Cro. fol. 651. Brotlige contra sequestration.

5 Car. I. Heber's case. Trover gist.

20 Jac. Elwes. Indictment for murder for a laying on a sequestration, one being killed : question if justifiable or not, pardon sued out.

These resolutions were so bloody and desperate, that it was to maintain them where conscience and common honesty were concerned to preserve people and their estates from tricks and cheats, and no remedy for any person in these cases following, if those resolutions were maintainable, but since have been changed.

3 Car. I. Rolls' Abridgment, 376. Bond lost not recoverable.

22 Edw. IV. fol. 6. A release obtained from trustee, no release for *cestui que trust*.

13 Jac. Finn and Powell.

11 Edw. IV. Resolved that money on a bond, and the bond lost, and after sued for, yet no remedy, but the money must be paid again.

13 Jac. Powell contra Harris. Null account contra executor.

Eodem anno. Glascock. Entry lawful for condition broken, not to be relieved.

14 Jac. Bromadge contra Election to pay damages for executing a bargain in specie.

Trin. 17 Car. Either cited in the C. B. or in the Star Chamber, moved by Serjeant Bacon for a prohibition *sur* sequestration : the judges found on debate, that the land was not within the sequestration for which the prohibition was prayed ; but if the lands, for which the prohibition was prayed, had been subject and within that sequestration, it was granted the sequestration had been lawful.

Court-Baron, a *levari fac'* may be renewed from time to time ; and in chancery, may be in like manner as at common law.

And may sequester land and copyhold too, and may be extended to a personality, for a sequestration to be laid on and administered by court of equity, never to be laid on but conscientiously.

Sequestration to come *bona fide* without consideration, yet good.

Derby Com. contra Com. Ancram. Sequestration goes not till suit revived against the heir, unless the father's conveyance be pleaded.

Witham and Bland. A voluntary conveyance to the heir to avoid an approaching sequestration against the heir, good, if *bona fide* done; but in this case where fraud appears, authority and reason against it.

Reason 1. Not to allow it in case of a just duty decreed.

2. Makes this court illusory.

3. Permits mankind to be cozened.

And two are settled already. Witham and Bland's, which began in the time of my Lord Shaftsbury, and was where the son claims against the father, &c. which came to be heard the 4th of March, 1672. And was in November following before his lordship, the now Lord Chancellor, a sequestration was ordered to issue.

The son departed from his voluntary conveyance, and set up a prior conveyance, with power of revocation; but the deed being without a power of limitation to limit new uses, which his lordship then and now declared, that although no power of new limitation was expressed in the deed, yet the law gives the revoker a power, for he that has power to revoke has power to limit.

17 May, 29 Car. II. Langley and Breydon. A sequestration for personal duty, and then declared a voluntary conveyance on purpose to bar sequestration, void.

And here in this case the wife shall have that part of the estate settled on her for jointure.

Objected by Sir Francis Winnington; your lordship declared a voluntary conveyance would not bar a sequestration, therefore permit us to try it.

Curia. No; I am of opinion there is fraud apparent, and needs no trial for satisfaction.

Snelling contra Squib. Eodem die.

[47]

Snelling had judgment against Sidenham of 1200*l.* for payment of 500*l.* Squib purchased of Sidenham for valuable consideration without notice: Snelling sues Squib to discover lands subject, &c. that he might extend, not knowing the place nor who tenants. Squib pleaded his purchase for valuable consideration without notice.

Purchaser of
lands subject
to judgment
not enforced
to discover,
otherwise, if
to decree.

The Lord Chancellor allowed the plea, for such purchase shall not be hurt in chancery against the plea; and therefore Squib shall not be enforced to discover what lands are liable.

1. It was much debated, and objected, that a judgment binds the land whoever had it: and the plaintiff's bill is not to have a decree for his debt, or to have the land, but to discover the same whereby at law he may recover his debt.

2. His title is given him by act of parliament, by which the land is subject, and was not at common law.

3. The consequence of this will makes all statutes and judgments, which are a security by law, to become of no effect, for the conuzee must extend the whole, or a moiety of the whole: and if he omit any part, his extent is avoidable, and by consequence, he that acknowledges a statute or judgment, and after aliens any part for valuable consideration secretly, it will be in his power to avoid his own securities.

4. There will be no difference between a judgment obtained by consent, and a judgment in *inviatum*, or process of law; in which case it will be very hard for any person, that any man by his own act, should avoid the justice of the law, whether he carry it secretly or openly, or to enable any other man to do it by secret or other means.

5. Where men contract, the purchaser may provide for himself by covenant; but he that recovers by law, cannot provide for himself by covenant; so that the case is more strong in case of a judgment, than in case of a mortgage, or other estate by conveyance.

[48]

6. A purchaser from J. S. who has a decree against him in chancery for land, shall be bound by the decree though he had never notice of it; and yet the decree in chancery binds the person and not the land, and the judgment may bind the person or the land: and it is hard that the chancery, whose power is only over the person, shall execute their own decrees against a purchaser, and not assist the execution of a judgment at law: whereas a purchaser after a judgment is as innocent as a purchaser after a decree, in point of conscience.

But the last objection at the hearing was not made.

Lockner contra Strode. 9 February, 1680.

Vide Juxon
and Merriis,
fol 42.
Under Sher-
riff's bond.

Bond entered into by the plaintiff of 4000*l.* to the defendant, when high sheriff of the county of Somerset; the bond was without condition, but intentionally for performance of covenants, to save the high sheriff harmless from escapes, and to pay the high sheriff out of the profits of the office 400*l.*

Jones, Attorney-General, insisted for the plaintiff, that the bond and contract for selling and farming the office, was void by the statute.

Serjeant Maynard insisted for the defendant, that it was the plaintiff's own agreement to pay it out of the profits, and the under-sheriff was but his substitute; for if the profits did not extend to 400*l.* then he was not to pay so much, but to be accountable: and if they amounted to more, the defendant had no power to call him to account for any more than the 400*l.* only.

Besides, the statute was not penal, nor inflicted any forfeiture or other punishment on the sheriff, if he had farmed the office.

Curia. My lord was of opinion seemingly, that the 400*l.* ought to be paid, but referred it to a trial at law in Dorsetshire what was the agreement, whether he was to have 400*l.* or no.

Tiffin contra Tiffin. 11 Feb. 1680. *Vid. Post* 55.

[49]

Land in question was mortgaged for years, and purchased by A. B. from the mortgagor, the conveyance was of the fee-simple to A. B. and the mortgage lease to friends in trust for A. B.

Then A. B. makes his will after the month of June, 1677. The will was attested by three witnesses according to the statute, but he died before it was signed by himself; the devise was to his wife and made her executrix, and left her assets enough to pay his debts, as was alleged by the plaintiff, but denied by the wife's counsel, but no proof as to that was read on either side.

The bill was by the heir against the trustees and wife to have the term assured with the inheritance, because by the original purchase the term was to wait on the inheritance in equity, which inheritance did not pass by the will (*e contra*), objected, though in case of land the testator may sign the will, else void. Yet in case of personal estate, a muncupative will is good, and no subscription is required by the statute, and this will is accordingly proved by the wife in the ecclesiastical court, and there may be debts for ought appears whereto this lease shall be liable; the plaintiff's counsel cited the opinion of Hales, Chief Justice, who took a difference between the cases, the testator's original purchase kept the lease severed from the inheritance to preserve it from incumbrances, and where himself after purchase of the fee made a long lease to wait on the inheritance.

Lord Chancellor said, I will neither make a lease for years that waits upon the inheritance where it is not assets in law, to be assets to pay debts in equity, and where a long lease should wait upon the inheritance, the inheritance being in trust in other men, and the long lease in the purchaser, and the purchaser dying indebted, so that the term in law will

Lessee for years owner of the inheritance in trust for him and his heirs devise the lands, but the will not signed by him the heir hath a decree for the term.

Trust of a term waiting on the inheritance when shall be assets.

come to the executor and be assets to creditors, there I will not make it no assets in equity.

Mr. Keck offered reasons with that difference.

Churchil, *e contra*, said it was the ancient difference of the court.

Lord Chancellor affirmed the difference.

[50]

Then Keck objected that here was a plain intention of the testator that his wife should have it, and the will though not signed is a good declaration of a trust of a term, though not signed by the party, because such a will is good as to a chattel by the statute.

Lord Chancellor decreed for the plaintiff against the will, and said else the statute would be of little effect, for most estates have leases, extents or judgments waiting on to protect the inheritance, &c. And if they should be divided from the inheritance by a will not signed by the testator, the statute would be of little effect.

In this case I was not a counsel, but remembered the case of Nurfs and Yarworth, 1674, resolved by his lordship, which in reason I thought was contrary to the reason of this case; for there a will which was void as to the inheritance, yet was made good as to the lease that waited upon the inheritance, and the case there was somewhat stronger, because the devisee of the lands was plaintiff there for the term against the trustee of the term and the heir, but is here defendant.

Ellis contra Gnavas.

Heir of mortgagee decreed to convey to administrator of mortgagor.

Where the heir of a mortgagee was decreed to convey the land to an administrator of a mortgagor, though the mortgage was forfeited, and the heir in possession by descent and no want of assets, and the mortgagor did offer to redeem, the Lord Chancellor saying for reason, that the mortgage money being part of the personal estate, the lands shall go to the administrator, because the money would have gone to her. And *quare*, if in such case the mortgagee should have devised the mortgaged lands by will in writing, but not attested according to the statute, and that will proved in the ecclesiastical court, whether the devisee or executor shall have the land or money when clearly he meant the executor should not have it.

DE TERMINO PASCHÆ.

Anno Regis 33 Car. II.

IN CANCELLARIA.

*Sir John Winne contra Sir Thomas Littleton and his lady,
William Price, &c. 30 April, 1681.*

The case on hearing was, William Price seised of land in the county of Flint, Merioneth and Denbigh, conveyed them to Goulsborough, but defeasanced for payment of 1600*l.* and interest to Goulsborough. Sir Richard Winne was party to the defeasance, and covenanted with Goulsborough to pay the money in case Price failed; and in such case G. was to convey, &c. to Sir Richard Winne, who on failure of payment by price paid the money, had the lands conveyed to him, and entered and enjoyed the lands divers years.

Mortgage in fee administrator shall have the money, though the mortgagor (having other lands) deviseth all his lands to J. S.

Sir Richard Winne being thereof so seised, and seised also of other lands in other counties in Wales, whereof part lay in the county of Merioneth, (as part of the mortgaged lands did, but of no lands in Flint and Denbigh, but the mortgaged lands,) made his last will in writing, viz. and thereby devised to the plaintiff all his lands, tenements and hereditaments, in the county of Anglesey, Merioneth and Carnarvan, or in any or either of them, or elsewhere within the dominion of Wales. And after the bequest of several great sums and legacies, did go and bequeath all the rest and residue of his goods, chattels and personal estate whatsoever, his debts, legacies and funeral expenses, being first paid unto his loving, &c.

I devise my personal estate.

[52]

whom he made sole executor of his last will, (leaving a blank.) The said Richard Winne died without naming any executor of his said will. And the defendant dame Ann being his sister of the half blood by the mother's side, and next of kin, did take letters of administration of his personal estate with his will annexed.

Testator giveth all his personal estate to his executor, but nameth none it is void.

And herein the sole question was, to whom the mortgage money, being now come to 3000*l.* should be paid upon redemption; the plaintiff claimed it, because by the will the mortgaged lands did pass unto him, and consequently the benefit of the mortgage money, the rather for that Richard Winne had entered on the mortgaged lands, and was in possession at the time of his death. And the devise of the personal estate was void, being devised to an executor, and none named.

The administratrix insisted, that now by the rule and course of the court, where lands are mortgaged for payment

Where lands are mortgaged for payment of money, the money is part of the personal estate, and shall go to the executors or administrators, and not to the heir.

of money, the money is always accounted part of the personal estate, and shall go to the executor or administrator whenever redeemed, though the mortgage be in fee-simple, as here it was, yea, although the money be made payable to the mortgagee and his heirs, and that in this case the personal estate being devised to his executor, is a good declaration that his personal estate should go to his executor, though the devise for want of naming an executor is void as a devise, and consequently the money belongeth to her as administratrix. And it was enforced farther, that the intention of the testator was only to pass his paternal estate, because he does not expressly mention Flint and Denbigh, where the mortgaged land lay, saving only Merioneth, where part of the mortgage lay, but his paternal estate also lay there, and chargeth the devisee of his lands with a rent-charge to another kinsman, which if he should charge the same on the mortgage would be in part lost upon the redemption of the mortgage. And men, when they speak of their lands, use not to call their mortgaged lands their lands; and when the testator deviseth by the words all my lands, he intended his paternal estate.

The court thereupon and after long debate decreed the mortgage money to the administratrix.

[53]

DE TERM. SANCT. TRIN.

Anno Regis 33 Car. II.

IN CANCELLARIA.

Anonymus. 1681.

Covenant at under age decreed to perform.

The father and son within age, covenant to convey lands on valuable consideration, the son was *infra aetatem*, but being now come of age, the father is decreed to procure his son to convey.

Anonymus. 1681.

Revenue of hospital improved is for the poor, not the guardian who had a certain stipend.

Queen Elizabeth founded the hospital of _____ in _____ and appointed five poor therein, each poor person to have therein 8*l.* per week, and 8*l.* per annum to the guardian, and made a prebend residentiary of the cathedral of _____ *pro tempore existen. gardian*; the land so given to the hospital is now improved to be worth 60*l.* per annum. Now the suit being in Chancery for the poor brethren to have increase of maintenance; it grew to be a question, whether the guardian should not have increase also: and the decree

was that all above 8*l*. per annum should be to the poor only. Some of the counsel made a difference between this case and where the only employment was to be a guardian, for here he is made guardian who is a prebend.

Anonymus. 1681.

[54]

Sir John Gell, and others, who are creditors of Charles Agard, deceased, plaintiffs, against John Adderly and others, trustees of Charles Agard, and against Smith administrator of Charles Agard, and also creditors of Charles Agard and other creditors of Agard, and against other purchasers of his lands. The case on hearing was, viz. Charles Agard seised in fee of lands, and indebted to divers persons conveyed his lands to the use of himself for his life, and after to the use of his will, and by his will devised the lands to Adderly, Orme, &c. for payment of his debts and died. The trustees being creditors of Agard, and bound with him as his sureties, after this suit sold the lands, paid themselves and other creditors to whom they stood bound, and the plaintiffs being also creditors unsatisfied, and nothing left to pay them, their bill was to have proportionable satisfaction. At hearing, the Lord Chancellor decreed accordingly, and declared,

Devise of lands to pay debts.

Trustees being creditors pay themselves first. All creditors equally concerned where trust of conveyance is to pay debts.

Trust. Debt. No difference to be made in payment betwixt debts by promise and debts by specialty, but equal in proportion. On bill of review.

35 Car.2. this decree was reversed by the Lord Keeper North in one point, viz. that those creditors who had received their moneys should not refund any

[55] part of that which they had received. Statute of frauds and perjuries. Will.

That when a man settles his lands for payment of his debts generally, then all his creditors are equally concerned and entitled, and none is to be preferred before another, and in this case debts without specialty are to be in the same condition, and equally regarded as debts by specialty; for though there be a difference in case of executors who are to pay specialties before promises, that is an artificial preference by law, but naturally a debt by contract without specialty is as just as the other. And the conveyance to the trustees being themselves creditors, and sureties for a guard, doth not give them any preference before others, but they must be in the same degree in point of payment and satisfaction as other creditors were. And though some circumstances in this case might give hope or confidence to the trustees that they might prefer themselves, viz. that Adderly was his servant, Orme lent his money at the time when the conveyance was made, and some speeches tending to declare such trust, yet that alters not the case; besides such declaration was since the statute of frauds and perjuries.

But as to the personal estate, the administrator may according to far as that goeth, prefer himself so far as the personal estate extends, but no farther.

Tiffin contra Tiffin. Vide ante 49.

Sir Roger Martin seised in fee of lands in Long-Melford, &c. mortgaged the same for years; Robert Tiffin agreed

Term.
Inheritance.

with Sir Roger Martin for the purchase of the lands and paid the mortgagee, and bought the inheritance of Sir Roger Martin who conveyed the inheritance, viz. the reversion of the mortgage to Robert Tiffin, the mortgaged lease for years was conveyed to Tucke and Groom in trust for R. Tiffin; R. Tiffin seised in fee of the reversion, and interested in the lease for years, *ut supra*, in trust to wait on the inheritance, makes his will in writing, and thereby deviseth the lands in question to J. S. for life, and afterwards in the same will deviseth the lands in question, and all his lands, tenements and hereditaments, (naming none by name) to his wife, charged with several sums of money, and makes her executrix; she after his death proves the will, and takes administration *cum testamento annexo*, no executrix being named in the will. The will was made after 1674, to wit, in August 1679, the plaintiff as heir to the devisor exhibits the bill against the administratrix and devisee, and against the trustees of the lease. The cause came to be reheard on petition of the wife, (for the cause was decreed against her formerly, because the lease was to wait on the inheritance.) And the will (as to the inheritance being made after 1674,) and not signed or attested *pro ut* the statute, was void. I was not at the first hearing of counsel, but now with Mr. Solicitor and Mr. Keck, offered to the consideration of the Lord Chancellor.

1st. That it is true the will is void and ineffectual, *quod* the inheritance and free-hold.

[56] 2dly. But is good and will take effect as to the lease and the trust thereof, although that such a lease regularly shall wait upon and go along with the inheritance, but such attendance of the lease is not by law, but is a creature of this court, but this court will never make it to go with the inheritance, if equity be against such attendance, and therefore if a man purchase land as in this case, and take a long lease in his own name, and the fee in friend's names in trust for him and his heirs, and dieth indebted without other sufficient assets to pay the debt, the executor shall retain the lease to pay the debt, and the lease shall not wait on the inheritance contrary to the express intent and meaning of the owner of it, and the meaning of parties, and therefore if the *cestuy que trust* of a term that in equity should wait on the inheritance, should recite in his will that he was *cestuy que trust* of it, the reversion in fee to himself, and should thereby devise the term for payment of his debts or to younger child, this would be good in equity. The devise to the wife in this case is good to her, though by general words, but the general are as strong as if they had particular names, for he had no other lands. As a devise of all lands will carry a term for years

in lands, if there be no other estate of lands in the devisor but for years. Lord Chancellor decreed for the heir against the wife, because else the statute would be easily avoided, and of small effect and of dangerous consequence, for few men's estates of value but have leases or incumbrances by statute or judgment, &c. waiting or protecting the inheritance, and if they may be disposed by will made without those circumstances which the statute requireth in case of devise of inheritance, notwithstanding the statute, the statute is of little effect.

A question was moved that this will was not according to the statute : but the Lord Chancellor himself who moved it answered himself, viz. as to that, that it was proper to be objected in the court ecclesiastical, and being under probate it shall be intended good here.

Dashwood contra Elwell. 20th June, 1681.

D. employed E. a citizen of Exeter to sell for him divers Irish commodities, which E. received for D. who dwelt in London ; E. sold the goods in trust, and took bond for the money, viz. so much as came to 300*l.* and died ; the defendant his son is sued for an account, the question was whether the bonds be a good discharge, for the obligors were failed since the bonds taken, for it was said the bonds were taken the better to secure the debts, for the buyers were tradesmen as dealt in wool, and they would be bound to Elwell their neighbour whom they knew, but not to Dashwood whom they knew not.

Factor takes security in his own name, without notice of it to his principal. Merchant. Factor.

[57]

E contra, it was objected, that though a factor having a general commission or authority to sell or dispose of goods, may sell or dispose on trust without special warrant, order or restraint, and may give day of payment, yet he cannot take security by bond in his own name, especially without authority to do so, or at least giving timely notice to his principal of it, else it will be in the power of a factor that deals for several merchants, and for himself also, taking securities by bond in his own name, if any of the debtors fail to gratify whom he pleaseth with the good securities, yea, himself, and play the securities good or bad into his own hand, or into what hand he pleaseth, which will put a strange power in factors, and be extremely prejudicial to trade and merchants : so in the case of Gibbon and Doyley, where the testator gave *residuum bonorum* to be divided among sixteen of his kindred by name, as his executor should voluntarily without compulsion of law declare ; the executor divides to fifteen, and they were satisfied, and was willing to pay the rest to the sixteenth who now sued for an account of what the residue was ;

Factor that hath a general commission may sell on trust.

But cannot take bond in his own name

Prejudice. Merchants. Gibbon and Doyley.

[58]

the executor pleaded the matter in bar of the account, offering to pay the sixteenth man the plaintiff, such a sum which was as he pleaded the sum left. But the now Lord Chancellor disallowed the plea, because heed was to be taken that we make not such examples, under which dishonest men may shelter themselves. And if this power should be allowed to factors, dishonest factors will have a very safe shelter, and it will be impossible to discover what goods he sells for one, what for himself, and what for others. If an executor hath orphans or other men's money in his hands, and hath power to lend it, if he do so and take security in his own name, which faileth, he shall answer the debt of his own money, unless that he endorse the bond, or do some other thing at the time of lending the money or taking the security, which may doubtless declare the truth, &c. and in the present case, the factor by taking the bond in his own name hath disabled his merchant ever to recover against the debtor, who knowing no other but that the goods sold were Ellwell's, and giving him bond for it, there now is no remedy for the debt at law but in Ellwell's name on the bond, which was otherwise before the bond was taken.

The Lord Chancellor put the defendant to prove that the testator Ellwell gave particular notice to the plaintiff that he had sold on trust, and to whom, whereupon a letter of the testator to Dashwood was read, wherein he gave notice of the sales to Bartlet, and his failing. The bill was referred to a master.

Nota.—There was no notice of the bond in the name of Ellwell not till after Bartlet was failed.

Newcomb and Dorothy uxor, contra Bonham and Alice uxor.

Mortgage.

Anthony Young being seised in fee of lands, and a house and mill of 100*l.* per annum value, (the plaintiff's proof was 114*l.* the defendant's proof 95*l.* the medium 103*l.* or thereabout) and being indebted 1,000*l.* and his mother seised of 60*l.* thereof, to receive out of the premises in possession for her life, the reversion to him, agrees with the defendant who had married Alice his sister, that if he would furnish him with 1,000*l.* whereby he might be enabled to pay his debts, and have no interest for it during the life of Anthony, unless he, viz. Anthony Young during his life should think fit to repay it with interest, then he would so settle the premises as that he might enjoy the premises during his life, and that the premises should be settled to come to the defendant and Alice his wife for their lives, and to the heirs of the defendant after his death, and that he should have power during life to redeem on payment of the 1,000*l.* with interest, but his heir

should have no power after his death to redeem, but the defendant should absolutely enjoy the premises, and gave this reason, viz. that he might marry and have children, and therefore would have power during his life to redeem, but his heirs should not, and gave such instructions to draw assurances accordingly, which was accordingly deposed by the party who drew the assurance. The assurance drawn was a conveyance to Bonham and his wife, and the heirs of Bonham; and Bonham and his wife redemised the premises to Anthony Young for 99 years, if he lived so long, and a covenant, that if Young during his life should pay to Bonham 1,000*l.* with interest from the deed on six months notice, then Bonham and his wife to reconvey, and in enforcement of the defendant's title against a redemption by the plaintiff Dorothy the heir of Young, who was the daughter of Young's brother, it was proved that she had offended him, and he had declared she should not inherit him; that Alice being his sister, he had kindness for her. And this case was not like other mortgages which are mutual.

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But a redemption was decreed by the Lord Chancellor, and the personal estate to be applied to aid the heir towards satisfaction of the mortgage, because it was a security, and being so, could not be extinguished by any covenant made at the time of the mortgage. The defendant prayed a rehearing. It is true, that if it were a mortgage no covenant should alter it, but this is not a mortgage, but an especial contract, made not in consideration of lending of money, but on consideration of blood and accommodation of the affair and necessity of Anthony Young, and to settle his estate in his blood; for he was resolved before this conveyance was made, on two things, 1. By reason of the unkindness of his niece to him, that she should not have his land as heir. 2dly. That if he had no issue of his own, that then the defendant Alice should be his heir and have his land. But then he considers his own condition, viz. he was indebted 1000*l.* which chargeth him until that were paid, with 60*l.* interest per annum, besides incident and increasing charges by renewing of bonds, brokerage, &c. And as to the condition of his own estate to answer the debt and interest of his debt, his own estate was in possession but 40*l.* a year, which could not answer the interest, viz. 60*l.* nor ever satisfy the principal, neither could he have 1*d.* out of his estate to maintain him.

Thereupon he further considers what way to take to debar his niece who had dislodged him so highly, as to beget in him such a resolution as that she should not have his land, and to prefer his sister who was nearer in blood than his niece, to which he had three motives, viz. the nearness of blood. 2dly.

Kindness of the one and unkindness of the other. 3dly. His sister had children, but his niece had none. So that probably if his sister had his land, then it would remain in his blood still, of which he saw no hope in the niece.

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3dly. This resolution to prefer his sister was not so absolute, but he would first provide for his own children if he should have any: this is provided for by the covenant to redeem during his life, and the limitation to redeem only during his life, provides for his intention touching his sister.

4thly. On all these considerations, he himself contrived a way that if it might be effected, and will answer all these ends, viz. free him from his present pressure, want of maintenance, and free him from present interest of 60*l.* per annum, give him present maintenance of 40*l.* per annum, with expectation of 60*l.* more after his mother's death who was jointured therein, and then he had hope of a portion with a wife to redeem the estate in his lifetime, and so become a free man.

And accordingly he makes the conveyance *ut supra*, which is not any way suitable to, or like an ordinary mortgage which scrivener's make.

1st. There is no use to be paid during his life, so that he is freed from clamour of his creditors and debts.

2dly. There is no covenant on his part ever to repay either principal or interest but at his own pleasure, so no interest or principal could be required of him.

3dly. The land is conveyed to Bonham and Alice his wife, sister of Anthony Young, and the heirs of Alice the wife, which were a strange and unreasonable way of mortgage, that the husband's money should be lent and the security be the wife's; but this was to comply with the intention above, that the land in case he had no issue should remain in his blood.

And it was not unreasonable in that case that the estate must go to collaterals and females, to prefer a sister before a niece, especially when the sister had children, but the niece none.

Object. Here is a power to redeem, and it shall never be extinct by any covenant at the same time.

Resolv. This indeed is an usual way of borrowing, no clause shall alter it.

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But this is here a special contract, on special and necessary occasion, and is not properly a mortgage; it is *contractus innominat.*

The mischief of the objection is, if it should be, &c. then it would be a way to oppression, and rigorous exaction and oppression of necessitous men by usurers, but here it is quite contrary.

The special circumstances of this case distinguish it from other mortgages, and never like to be drawn in example, for who will lend money on such terms, viz.

1st. Never to be able to demand principal or interest, but to be wholly in the liberty of the borrower, especially considering that the principal and interest money would exceed the value of the land; as here, if Alice had lived it might.

But yet this is a more special case, viz. consideration of blood, and a consideration not expressed may be averred, though not expressed in the deed, and so we do, and so it appears.

And the worst of the case amounts to no more than this, viz. if he by marriage or otherwise should not be enabled to redeem, his sister should have his land rather than his niece.

In case of a mortgage the mortgagee may exhibit a bill to discharge the equity of redemption, and is an incident to the mortgage which cannot be in this case, &c. *Ergo*, &c.

The great reason *& e contra*, is the mischief that would ensue to men in want, who are enforced to borrow moneys, for their necessity will induce or enforce them to submit to any conditions. And therefore in general, and *prima facie*, the rule is good, that when a mortgage is made, no covenant or agreement in the deed of mortgage shall make it unredeemable on failure of payment, and therefore if a mortgage be to redeem for years, or during the life of the mortgagor or mortgagee, and not after, the mortgage in equity may be redeemed after, for it is a trivial clause, (not after) and is contrary to equity in the creation of it, and would be of evil consequence, for every lender would make himself Chancellor in his own case, and prevent the judgment of this court in a case proper for the court, and this were a general mischief.

Therefore first consider if there be any probability of such mischief in this case, such as should destroy the express contract and agreement of all the parties made without surprise or consideration.

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To which end observe how much this case differs from ordinary mortgages, and how unlikely to be imitated by money-lenders, and to be drawn into practice or example.

1st. In other and usual mortgages interest is payable till time of redemption, here none by agreement.

2dly. The non-payment of interest is not for any certain time, as for so many years, but none to be paid during life, and that during the life of the mortgagor himself. Where is that money-lender that will lend on such terms? for here he can never know as long as the borrower liveth, whether he or his heirs or his executors shall be owners of land or owners of the money. In Sir Wollaston's case, a redemption of a mortgage at the suit of other creditors was denied, because of the length of time, because there ought to be a time when the mortgagee may be certain of his interest, either of land or money.

3dly. This is enforced from this, that in all causes of mortgages regularly, the mortgagee hath equity on his side to have a decree to bar redemption on failure of payment, as well as the mortgagor to have redemption; the remedy is equitable and mutual. Regularly and ordinarily, this is so, but it fails on the mortgagee's side during the mortgagor's life. Then 1. This is not an ordinary mortgage, because not subject to the rules of mortgages. 2. And this circumstance doth make the case not likely to be mischievous in consequence, for no man is like to lend on such terms.

4thly. The value of the land conjoined to these former considerations is very material; the land in possession at most but value 40*l.* per annum, besides taxes, duties to the church and poor, and the reversion of an estate of a jointress in being, and no possession of the 40*l.* per annum during Young's life; so in effect it is a reversion after one life of near 100*l.* per annum, viz. 40*l.* per annum for one life, 60*l.* per annum after two lives, and this conveyed for security of 1000*l.* no interest to be paid during Young's life.

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Part 60*l.* per annum,
A mill.

The 60*l.* after two lives, 7 years purchase.

60*l.* at 7 years purchase 420.

40*l.* after one life, 9 years purchase 360*l.*

10 years 400*l.*

So that we have a bad purchase, &c. if absolute, but if Young had lived 9 or 10 years a miserable bargain, and yet he might have lived 20, 30, yea, 40 years.

Surely he must be sick of his money that will take this for a precedent, so as there is no fear of the ill consequence.

Object. Here Young died quickly.

Resolv. He might have lived long, and the event changeth not the nature of the agreement.

What man in his senses would go by such a precedent or example?

If Young had lived 7, 8, 10, 20 years, the court would not have relieved him, much less his heirs.

Two other reasons, &c.

1. From the condition of his estate.

2dly. Of the consideration, &c. not only of money, but blood and kindred was the consideration of the conveyance.

Object. Consideration of blood is not mentioned.

Resolv. It may be averred and is fully proved.

The Lord North, Chief Justice, and Champernoona contra Williams. 21 June, 1681.

Cestuy que
trust in tail

The great and ruling point in the case was, whether *cestuy que trust* in tail, suffering a recovery and no tenant to the

præcipe, but being in possession under the trustee who had the freehold in him, but was no party to the recovery, but *cestuy que trust* in tail was the tenant, should bar the remainder in fee of the trust. The matter was much debated on reason and precedents. The Lord Chancellor decreed it a good bar, and took a difference, viz. if that there had been a *cestuy que trust* of a trust for life before the trust in tail, so that in case the estate in law had been executed according to the trust, and consequently the tenant in tail could not have barred the remainder in fee if he had suffered a recovery, there *cestuy que trust* in tail should not bar the remainder by a common recovery if there was no tenant to the *præcipe*. He said also that a trust is a creature of chancery, and is not within the statute of Will. 2d. *de bonis*, &c. and though if tenant in tail of a trust cannot bar the remainder by fine, yet if he makes a feoffment or bargain and sale, he may bar his issue.

suffers a recovery, it is good.

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Draper's case. July, 1681.

Sir Andrew King made his will, wherein he deviseth in these words, viz. all the rest and residue of my estate whatsoever, both real and personal, I bequeath to my executors, the survivor and survivors of them, to the intent and purpose that they do with all care and diligence as soon as the money can be conveniently raised upon the sale of the premises, and out of the rents and profits which will accrue out of my office in the custom-house, the lease of which and the proceeds and benefit thereof I intend should be preserved for the benefit of my executors, to pay and discharge all my legacies and debts.

Joint tenants or tenants in common.

Sir Andrew King made Edwards and Draper executors and died; Edwards paid the legacies and debts and died; Draper survived, and when all is satisfied, then my will is, that the term which shall remain in the lease of my office in the custom-house and the benefit thereof, shall be and remain to my executors share and share alike for their care and pains in execution of this my will.

The executors were Draper and Edwards.

The question was, whether the testator having in the former part of his will given all his estate, real and personal, to his executors, the survivor and the survivors of them, but in the latter clause given the term in his office to them, share and share alike, the executors are joint tenants of the term, or tenants in common; by the first clause they are joint tenants, but the latter clause, (share and share alike,) seems to contradict it, and the surviving executor claims the term by survivorship.

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Lord Chancellor. If a man devise to his executors, or make several men his executors, the survivor must carry all since the judges will have it so. (Note, this was his very expression, *vid. sup. fo.*) Yet when the testator makes a distinction between the term in the office and the generality of the estate, so shall I, and so he decreed the term to be in common not to survive.

Rep. Methinks the first clause, a devise to executors to pay debts and legacies is no devise or legacy, *prout dyer.*

[66]

DE TERM. SANCT. MICH.

Anno Regis 33 Car II.

IN CANCELLARIA.

The Company of Stationers. 15 Nov. 1681.

On Plea and Demurrer.

Stationers
patent prerogative.

The company of stationers complain by bill against Lee, for that whereas by patents the 3d and 4th of Philip and Mary, the sole printing and trading in almanacks was granted to them: the defendant did print and cause to be printed and vended secretly almanacks, and imported others from Holland, printed there, and sold them, and prayed discovery. The defendant demurred and pleaded. The demurrer was in effect to the plaintiff's title, that it was not good in law, and that the bill was only to discover a tort, as if a bill should be to discover a trespass in lands or goods.

The plea was, that he had been seven years apprentice to the trade of a stationer in London, and free, &c. And the custom of London was, that in such case any freeman might use any trade, &c. The plea and demurrer were overruled, and the defendant to answer the bill.

At which hearing the case and proceedings following were cited.

7 July, 14
Car. 2. Sta-
tioners.

Richard Atkins, Esq. and Martha, lady Acheson, his wife, plaintiffs, and George Moore, Miles Flesher, and others of the company of stationers, London, defendants.

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It was then alleged, that the plaintiff, the Lady Acheson, being sole daughter and heir of Sir John Moore, who by letters patent from King James, had the privilege of sole printing all books which concern the common laws of England; and the said Moore, by his will, made George Moore and others executors in trust for the use and benefit of the said Martha, to whom he gives all his leases, and so the benefit belongs to the plaintiffs; and yet the defendants, &c. do take

upon them to print and publish the said law books without any authority from the plaintiffs, for relief wherein, the plaintiffs have exhibited their bill, and the defendants being served with process, have accordingly appeared, but have not as yet put in any answer thereunto, as by certificate then appeared.

It was ordered, that an injunction be awarded against the said defendants, their servants, agents and workmen, thereby enjoining them not to proceed in the printing of any law books till the defendants should directly answer the plaintiff's bill, and this court take other order to the contrary. Vid. post.

May it please your Lordship, we have several times met together and considered of the case then annexed, according to an order bearing date the 13th of April, 1668, and are of opinion, 16 Feb. 1668.

That such new law books as have been imprinted since Moore's patent, and acquired by any particular person or persons, are not by law restrained by Moore's patent. But notwithstanding that patent, those men who have acquired them may print, but as to those law books that were printed before that patent, there are among us diversity of opinions.

Joseph Kelinge, John Vaughan, Matthew Hale, Thomas Twisden, Thomas Tirrel, Christopher Turner, John Archur, Richard Rainsford, William Morton, W. Wyld.

Upon hearing counsel on both parts this day at the bar, to 26 May, 1675
argue the errors assigned by John Streater, plaintiff, in a writ of error depending in this house, which Abel Roper, Francis Tytan, John Starkey, Thomas Baffet, Thomas Collins and John Place commenced against John Streater, concerning the privilege of printing law books. After due consideration had of what was offered on either part concerning the same; it is resolved and adjudged by the lords spiritual and temporal in parliament assembled, that the letters patent pleaded in bar of the action brought in the King's Bench, were and are good in law, and that the said judgment given in the court of King's Bench, for the said Abel Roper, &c. against the said John Streater is therefore erroneous, and shall be and is hereby reversed. [68]

Joseph Brown.
Clerc. Parliament.

Countess Downes contra Moreton, 16th November, 1681.

Sir Lucy, late husband of the plaintiff, articleed with her father before marriage in consideration thereof, and 6000*l.* to settle 1000*l.* per annum in lands, &c. on her for jointure, but not mentioning the particular lands, and after marriage settled on her *inter alia*, his farm in D. called Has- Consideration defective when supplied. Intention.

ledon and Woods in called A. the farm part of it lay as in the bill named, and part of 60*l.* per annum lay not there, and so of the woods, and if relief should be here for the part lying out of these wills, which were not well conveyed (as it was agreed on all sides, the conveyance was so penned that they did not pass,) was the question; but afterward the husband being made Earl of Downe, made a farther conveyance to some friends, whereby 500*l.* per annum of other lands were settled on the lady for her life. The husband died, the heir entered into that part of Hasledon Farm, and of the wood not conveyed. It was proved by many circumstances, and the acknowledgment of the husband, that he had settled the farm of Hasledon, and thereupon the Lord Chancellor decreed it to the plaintiff. If the bill had been only to supply the defect of the jointure, because it was not included in the jointure, he would not have relieved, because his subsequent augmentation might be in recompense; but the husband conceiving and declaring that he had settled the farm, the second was not a supply of a defect, but a farther voluntary provision, which would not have bound his heir being but voluntary, and therefore as to the defect of value in the woods he did not relieve the plaintiff, for that as to them there was no proof of his intent, that he had already settled them, and though his covenant was to settle 1000*l.* per annum, and there was want of value (they were 100 acres) he would not decree as to them, and did not decree them; yet as to the farm, he did decree for the plaintiff not to supply the value, but as that which he intended to settle, and as he thought he had settled, and so had acknowledged divers times not to supply out of the covenant, but to establish what he intended to settle.

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Anonymus. 16 November, 1681.

Privilege.
The king's
servants ar-
rested.

Cognizee of a statute by Sir Philip Howard took him being now a servant of the king in execution. He complained by motion in court of this as a breach of his privilege being servant to the king, who ought not without leave to have been arrested. The party showed that before he proceeded, he acquainted Sir Philip Howard of his purpose, and that thereupon Sir Philip Howard waved his privilege. Lord Chancellor; the privilege is the king's privilege, and not Sir Philip Howard's; you have been unmannerly towards the king and broke his privilege, you might as well have taken the king's coachman driving the king's coach. The party protests all respect to the king, &c. however, said the Lord Chancellor, I will not discharge the execution, but ordered the warden of the fleet to take him into custody, but because of the consent to discharge Sir Philip Howard of execution, the Chancellor

propounded that new security should be given for the debt, which the party by his counsel consented to, so as it might be a statute of 2000*l.* which seemed to the Chancellor to be too much, because the debt was but 500*l.* Counsel for defendant: there are sixteen years interest behind; but at last it was referred as to the manner and *quantum* of the security, and the party discharged of the present commitment.

Nota. In this case there was no bill depending, all came in by way of motion.

N. Progers contra the Lady Fraser, the same day on a Plea.

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The Case was.

Mrs. Dennis being found an idiot by inquisition, the king granted the custody, &c. of the idiot, and of her estate real and personal to Sir Alexander Fraser, his executors and administrators; during the ideocy he died. Progers got a second grant from the king, and sueth the lady for the lands, &c. she being executrix of her husband, and devisee of the custody, which she pleads in bar. The question was, whether the grant to Sir Alexander Fraser were ended by his death? First, it is a trust in the king, and therefore is not grantable to executors and assigns. Secondly, the like grant was never made before. Thirdly, it cannot be so granted, for if the party die intestate, who should take care of the idiot, therefore the office of the marshalsea cannot be granted for years: and fourthly, what estate can the grantee be said to have?

Custody of an idiot to one and his executors during the ideocy.

E contra, it was said, 1st. The king hath not only a trust as in case of lunacy, but an interest; for he hath and may dispose of the profits to his own use, and grant them over, and it being a chattel, naturally shall go to the executors of the grantee: and it is a special interest, not properly a term, like Manning and Drake's case, where a man hath power to enter and take profits till 100*l.* paid, and Corbet's case, 4 Coke: and in case of wardship there is an interest and trust conjoined; for the law trusts the king and his grantee to educate and maintain the ward, and so must be done in case of ideocy, as to maintenance of him or her.

Lord Chancellor said the case of idiot and ward are not alike, the wardship is by reason of tenure, the ideocy by prerogative; and said, he thought the case of gaolership not grantable for years too easily slipt over. But the case was put off, for he remembered a defect in the inquisition which found Dennis not an idiot *a nativitate* some certain time.

Coventry, &c. Executors of Sir Henry Thinn, contra Thinn, now Decree for mean profits after a former decree for enjoyment.
Executor of Sir James Thinn. 18 November 1681.

Sir Thomas Thinn, 1639, treated with the Lord Keeper Coventry, for a marriage between Sir Henry, his son, by

Katharine, his second wife, and daughter of the Lord Coventry, the portion 4000*l.* which was paid, Hempford, &c. to be settled on Henry, &c. The deed of settlement was executed by sealing and delivery of it, it being by way of covenant to stand seised, but wanted the words (shall be or shall stand seised,) and so was in law defective. Sir Thomas, after the marriage, died; great suits happened between Sir James, heir at law, and Sir Henry, for Sir James entered on Sir Henry, 1648. Sir Henry Thinn exhibited a bill in chancery against Sir James on the agreement, and had a decree, 1650, against Sir James, which was for enjoyment, but no farther, not for farther assurance or mean profits, Sir James continued disturbances. Sir Henry Thinn, 1659, brings a second bill, but that being ill penned he had leave to amend it, and made suit for the mean profits, it abated by death once of Sir Henry Thinn; and Sir James Thinn also dying; now the bill is for the mean profit.

Against the plaintiffs the objections were: 1st. The length of time; but that was answered by the many suits and abatements of them.

2d Objection. That it is irregular and improper to have a bill for the mean profits now, when Sir Henry Thinn had a former decree for the enjoyment, 1650, for he then ought to have had a decree also for the mean profits. And it is to be presumed that the court did then see cause to make no decree for the profits, in regard Sir James had a good title in land, and the times were troublesome, and the possession a stumbling possession, sometimes with one of them, sometimes with the other; however, it is not reason now to patch up the former decree by a new one.

The reply was, 1st. The former bill demanded not the mean profits, nor an account thereof.

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2dly. It was not unjust by one bill first to clear the title by one bill, and then to exhibit another for the profits; and it was not reasonable till the title was cleared to the principal, the manor settled while Sir James set up titles to the whole, one while by an entail which avoided the settlement, if not cut off, another while for want of tenant to the *præcipe* in the recovery which docked not the entail as to several tenements.

But those questions being settled by several verdicts, now and not before was time to have an account; and 2dly, after a decree for enjoyment it is proper to exhibit a bill for the mean profits, or as the case may be, for further assurance or for the evidences.

And for these two last reasons, and particularly for the last reason, the Lord Chancellor decreed the executors to

account for all profits by him, his agents and baily received since the decree, 1650, (*quare*, if not the exhibiting the bill, 1648,) but not for all profits, which he did or might receive without his wilful default, as in some cases is usual.

Perrat contra Ballard. 22 Nov. 1681.

The defendant bought of Portman, jewels, plate, &c. for valuable consideration paid. Portman became a bankrupt, and a commission was taken out against him, and the commissioners examined Ballard, the defendant, touching the goods what they were, and the value of them, but on pretence that he did not answer the commissioners, committed him; but on an *habeas corpus* in the king's Bench he was delivered. The answer before the commissioners being as to the time, &c. to his remembrance, and that he could not positively answer farther, and by consent he was again to attend and be re-examined, which he did.

And now the plaintiff's bill is to have the defendant's answer in chancery, where he pleaded, that he had no goods of Portman's, but such as he really paid for before the commission issued against Portman, and that he had no notice of any act or thing by Portman, whereby he was a bankrupt, but truly paid for what he bought &c.

It was objected he ought to answer the time of the bankruptcy, else the statute against bankrupt will be of little effect.

[73]

E contra. It is no equity to make a man in such case pay twice.

Lord Chancellor ruled the plea good, saying, it is an infallible rule, that a purchaser for valuable consideration shall never without notice discover any thing to hurt himself. But as to the point of bankruptcy, whether that the defendant, being formerly examined by the commissioners on oath, should be examined or put to answer to the same matter here. The Chancellor seemed to be of opinion that he should. But the other point being clear, there was no debate on this point.

Pit contra Hunt. 20 Nov. 1681.

The wife, before marriage, being possessed of a long term for years, and A. the person who was to marry her being indebted 400*l.* to J. S. by agreement of A. and J. S. makes a lease J. S. for 10 years to secure payment of the 400*l.* the lands being then accounted 80*l.* per annum, as is alleged, and by indenture sealed in presence of her husband, assigns the residue of the term to friends in trust to be at her disposal, whether sole or covert, (but no other words then, so to

It seems to me that this case differs from Turner's, first, because there the assignment of the term was on a former marriage, which husband being dead, she be-

came owner of the trust as a feme sole, and as to the second husband, all one, as if she had created a trust for herself of a term. Secondly, the assignment here is with consent of the husband, whose creditors can have no more right than he had, but Turner did not consent, &c.

exclude her husband,) and brought in money and other estate to the value of 600*l*. She marries; after the creditors of her husband (after June, 1674) obtain judgment in debt against him. And on *feri fac*. the sheriff sells the residue of the term; the vendees have now a decree against the trustees of the wife for the term, because the lords in parliament had reversed a decree obtained by the lady Turner who married Sir Edward Turner, who sold lands wherein trustees for her had a term for years, and the Chancellor held it not fit a decree should be one way in parliament and in another way here, but declared it against his own opinion, for else widows cannot in most cases provide for themselves. *Vide* Awercher's case, &c. and the husband in this case forsook his wife, refused reconciliation, allowed her nothing, &c. yet decreed *ut supra*.

Newland contra Horseman. 23 Nov. 1681.

[74] Horseman being owner of the ship called, &c.
Master, merchant, foreign servants examined.

whereof Ford was master; B. the plaintiff, treated with a friend of Horseman's for hire of the ship, and a charter-party was sealed by B. and Horseman, by which Horseman agrees that the ship shall sail to New England to take in fish on the account of Newland, and thence to Barcelona, and there to deliver the fish. Newland covenants with Horseman to pay the freight on delivery of the fish; the ship arrives at Barcelona, and the fish is delivered to one Dalmacie. Ford, the master, demanded of Dalmacie the freight, and Dalmacie demands a deduction out of the freight, pretending that there wanted 170 quintails of fish of what was to be delivered, and that a part of that which was delivered was damaged; thereupon the master sues Dalmacie in the court at Barcelona for freight; Dalmacie sues likewise for deduction of damage; the court there ordered the whole freight to be brought into court, and consideration to be had for damages for Dalmacie; thereupon Dalmacie appealed to a superior court; then Dalmacie removed the appeal on pretence of preventing several appeals; the master finding his freight lodged so that he could not have it till the cause was heard in the highest court, which was not like to be in some years time, comes away without any other freight or relading there for his principal's account, which he could not help for want of the money for his freight; then Horseman sues Newland on the charter-party for his freight here; Newland exhibits his bill in chancery to stop the proceedings here, though the suit was only to recover damages, and not for the penalty. The great debate was, whether the proceedings at Barcelona being judicial, and begun there by Ford, master of the ship, and sentence there

obtained by him should conclude and bar the defendant, he having caused money to be brought into court there, not as excluding the jurisdiction of this court by the sentence there, but that the court should have regard to the sentence, and insisted that Newland acted here for Dalmasie, and that Dalmasie was the principal factor, and not himself, and in case there should be a recovery against Newland, he was without any remedy against Dalmasie, which last matter seemed to stick with the Chancellor; whereto the counsel for Horseman offered that Horseman did consent that Dalmasie might take out his money again at Barcelona, and to make any instrument for that purpose; and they denied that Dalmasie was the principal merchant, for had it been declared to Horseman that Dalmasie was the principal merchant, and must have sought remedy against him, Horseman would never have let his ship to Dalmasie, being a stranger to him, and there is no probability that he would let his ship to freight to one that he had never heard of, nor had any thing to do with; and insisted farther, that though Dalmasie were the principal master, and Newland his agent, yet that will not concern Horseman, unless Horseman or his agent had notice of it, which they never had. And though Ford sued Dalmasie in Barcelona, that may not prejudice Horseman nor Ford, because he could not otherwise do, for by the course of merchants, the receiver of the merchandize is to pay freight upon the receipt of the goods. It was not possible for him to recover the money any other way, or against any other person, Newland being in England, and Horseman had instant necessity for the money to reload the ship back again, so the suit was not a matter of election but necessity.

The Lord Chancellor. If the cause had been fully determined at Barcelona, then but the cause is not fully determined at Barcelona, for the damages are not fully ascertained. In conclusion, he ordered that Horseman should proceed to a trial against Newland upon his covenants, and therein give in evidence the non-payment of his freight, and what damages he had thereby, and that Newland might give in evidence of the mitigation of the damage, and delivered no opinion how far or whether Dalmasie was the principal merchant or not, but would consider that when satisfied in that other point. Thereupon the plaintiff's counsel prayed a commission to Barcelona to examine to that point, which was opposed by the defendant's counsel, being publication was past and nothing proved in the cause of it.

[75]

Foreign judgments.

Commissioner to examine after hearing on new matters started at the hearing.

Churchil. This objection is raised by the court, and arose upon the debate, and was not in issue before, and is to be tried by letters resident in that place, as well as here.

Chancellor. Take a commission, and examine to it, if you will consent to go to trial next term, and return the commission before the term, and go to trial, whether the commission be returned or no. To which the plaintiff and his counsel assented; but moved first, that the defendant might name commissioners that the plaintiff may not be delayed for want thereof. Secondly, that the return of the commission might be by the post and not in the usual way may be allowed; and therefore the Lord Chancellor directed that the commission should be delivered to Mr. Herne to send the same by the post to Barcelona, and when executed, to receive the same back.

By the post.

Company of Stationers Case. 28th November, 1681.

Printing injunction before answer.

The king granted to the company of stationers the printing and vending of statute books. The defendant caused the statutes to be printed in Amsterdam, and in great bails and quantities to be imported to sell where they remained. The plaintiffs exhibited a bill complaining of it. The defendants appeared, but the time of answer was not expired till the 1st of October: I moved that the books might remain at the custom-house till answer. On debate,

Statute books

The Lord Chancellor ordered an injunction to stay the books there, not only till answer, but in *perpetuum*; for the printing of the laws was matter of state, and concerned the state. But for other books, viz. the Whole Duty of Man, and other like books being imported and staid, he left them to the ordinary course.

Taulurier contra Ward. 19 December, 1681.

Where one of two must lose, he loseth that trusteth most.
Loss.
Fraud.

Taulurier had a decree in Chancery for 600*l.* which was to be placed out on security in the names of Markfield a clerk in court and of Buchannon; Markfield would not intermeddle; Buchannon received the 600*l.* and the 3d of December lent it to Sir Richard Dutton, who entered into a statute of 1200*l.* to Buchannon for the payment. Taulurier was present at the lending. Afterwards Buchannon, who was usually employed by Ward, the defendant, in lending out her money, told her that a friend of his had occasion to borrow 600*l.* but would not be known to any but to Buchannon, nor give security to any but to him; but he (viz. Buchannon) would assign the statute to her, &c. Whereupon the 29th of December she took an assignment by deed from Buchannon of the statute, and the statute which remained in Buchannon's hands was delivered to Ward, and she paid the 600*l.* to Buchannon, who pretended he dealt for Sir Richard Dutton: after Buchannon died intestate; Taulurier obtained

letters of administration of Buchannon *quoad* the statute; Ward had the statute; Taulurier could not sue the statute at law, because she had it not to show, and Ward could not sue the statute, because she was not administratrix.

Now Taulurier sues Ward in Chancery, one of them must be cozened, and the question was who should be the loser.

Mr. Solicitor *pro quer.* We have equity, we paid 600*l.* we have the title in law by the letters of administration.

Dangerous to take security from a trustee without enquiry.

But *e contra*, it was objected for the defendant. Ward is not plaintiff, but defendant; she demands not any thing from the court; by the grant of Buchannon we have at least property in the wax and parchment; the question is, whether the court shall take that from us, who have without any fraudulent really our money? Besides, Taulurier trusted Buchannon with the statute, and Buchannon deceived her; and the usual practice of the court is, if a creditor trust the scrivener with the custody of his bond or security, and the scrivener receive and mispend the money, the creditor shall not recover against the debtor, for it was his fault or neglect to trust the scrivener.

Resp. *pro quer.* If the debtor takes not up the security when he pays, &c. and the creditor obtains the bond, and so hath remedy at law, there the debtor trusts the scrivener.

Winnington. The statute is dated the 3d of December. Ward lent not her money till the 29th of December, and she never spake with Dutton, which was a great neglect in her and a folly; if she had required of him, he must have warned her, and how could she lend the 29th of December, a security the 3d of December?

Rawlinson. The treaty with Ward was in the beginning of December, and the security was preparing that while, till the 29th of December. [78]

Chancellor. Do you prove the day when you first treated?

Rawlinson. We prove it about the beginning of December.

Chancellor. Ward ought to have inquired of Dutton. Is there any appeal brought from your granting the administration?

Respons. No.

The Chancellor decreed for Taulurier.

Sir Francis North, Plaintiff, Champemoon and others, Defendants. 17 December, 1681.

Sir Francis North, purchased lands in Essex, the fee of some part of the lands were in trustees, but the trust was after debts paid to Richard Allington in tail with other remainders over; Richard Allington the *cestuy que trust* in tail suf-

32 Car 2. *cestuy que trust* in tail suffers a recovery, remainders are barred.

ferred a common recovery with double voucher to bar the remainders over limited by way of trust, but no legal tenant to the præcipe, for the free-hold was in the trustees who were no parties to the recovery. And the great question was, whether the recovery did bar the remainder in trust, for the plaintiff's title was under that recovery.

[79] The decree is in these words: his lordship upon long debate of the matter on hearing what was alleged by the counsel on either side touching the same, declared, that he was fully satisfied that the said recovery did sufficiently bar all remainders depending upon the estate tail of Richard Allington, who suffered the same, it being a general rule, that any legal conveyance or assurance by a *cestuy que trust* shall have the same effect and operation upon the trust, as it should have had upon the estate in law in case the trustees had executed their trust, otherwise trustees, by refusing or not being capable to execute their trust, might hinder the tenant in tail of that liberty to dispose of his estate and bar the remainders, which the law gives him as incident to his estate, which would be manifestly inconvenient, and tend to the introducing of perpetuities, and doth therefore think fit, and so seemed to order and decree that the said defendants, Arthur Champenoon, Alice Champenoon, and Elizabeth Way, in pursuance of certain articles executed by them to the plaintiff for purchase of the manor and rectory, and advowson of the church of Harlow, &c. in the county of Essex, do forthwith make a conveyance of the said manor and premises to the plaintiff and his heirs, and that the defendants Anthony Cozen and Elizabeth his wife, (who is daughter and heir of the surviving trustee) in whom the estate in law of the premises resteth, and the defendants, Humphrey Williams and Dorothy his wife, and Thomas Dorston senior, and Bridget his wife, who are the heirs at law of the several testators, and are to receive legacies upon the said sale, and all other parties concerned do join therein. And it is also further ordered and decreed, that the Lord North do pay the debts and legacies, &c. some being infants, and their legacies were to be paid to their parents on their own security, which was to be allowed by a master, and thereon the plaintiff to be discharged of it.

If a commissioner in a cause be himself to be examined as a witness, he must be first examined; and if others be before him examined in his presence, he cannot be afterwards examined, having heard the former examinations. And for that cause the 16th of December, 1681, a commissioner who had so done, came up afterwards, and was examined in court. His deposition was suppressed *ex motione* Mr. Hutchins.

Anonymous.

An Account referred.

The master examined one witness three times to the matter of account.

Witness-
Examina-
tion.

Ordered, the depositions be suppressed.

Exton, &c. contra Turner. 17 Dec. 1581.

[80]

The plaintiff, Cornelius Burton, and several other creditors of John St. John, sued Martha Turner, the defendant's intestate, examined witnesses, and the cause heard. The main question at the hearing was, whether the defendant at the time of his purchase of the manor of Sapcot, had notice of the plaintiff's title? And that point being directed to a trial, a verdict passed for the plaintiff. But complaint was made to the court, that the plaintiff at the rolls, after hearing, got an order *ex parte*, to strike out the name of Cornelius; and that being done, the said Cornelius Burton was used as a witness at the trial, which surprised the defendant, and the court set aside that trial, and Cornelius Burton again made plaintiff afterwards. The bill abated by the death of Martha Turner, and the defendant Turner is her administrator. Exton, and some of the other former plaintiffs, without Burton, and two others, formerly plaintiffs, exhibit a new bill to revive the former suit. To which the defendant pleaded the order, that Burton should be plaintiff, and that a revivor of the former bill makes Burton party to the suit; and this is an act by leaving him out now to make him by a trick to be a witness, and the suit cannot be revived in part, but the whole proceedings, viz. bill, answer, &c. and all orders must stand revived, which the plaintiff's counsel did agree. A second point was, the bill was an original bill, for having set forth the premises, and the direction to try notice or not, they now allege that Burton had released his interest to the plaintiffs and trustees, and that they had several material witness aged and infirm, who may die before the trial, and pray answer, and that they may examine their witnesses. The defendant also demurred to this part of the bill, and was overruled to answer within a week, or to pay costs.

Witness.
Revivor.

Nota.—Where divers are plaintiffs, and the bill after hearing abates, some of them without the rest may revive the cause.

2d. Examination after publication and hearing in a bill of revivor, in the new cause; yet it was declared and agreed by Sir John Churchill, &c. of counsel with the plaintiffs, that such depositions could not be read in this court, but the cause being abated by act of God, viz. the death of the defendant,

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it is proper to examine witnesses in order to the trial, which the court hath already in the former cause directed; and those plaintiffs who now are not plaintiffs to revive the cause, have released, and the examination of witnesses is only to use them at the trial, not here. *Quere*, how it shall judicially appear to the court that there are such releases? and *quere*, how Burton's, or any others who cannot be read in this court, nor could not have been read if examined, shall be made use of in trial of an issue being merely matter of equity, as notice of a trust, &c.?

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DE TERM. SANCT. HILL.

Anno Regis 33 & 34 Car. II.

IN CANCELLARIA.

Harvey contra Harvey. 18 January, 1681.

Examina-
tion.
Contempt.

Sir Thomas Harvey, the plaintiff, had a decree against the defendant, for the surplus of the estate of Sir John Harvey, as residuary legatee. The process to discover the estate went so far as a sequestration, and Sir Thomas Hanmer was prosecuted on contempt, for that the house wherein the testator's goods were, being secured, and the trunks by former order locked and sealed, affidavit was made that a smith in disguise on Friday broke open the house, that then the chests, &c. were opened, and carried away, and goods, &c. and that Sir Thomas Hanmer was then there with others, and he being now prosecuted for the contempt, was ordered to be examined on debate.

Conyers contra Hamond. 7 February, 1681.

Place sold
and lost, the
money re-
stored.

The defendant sold a commissary's place in the king's troops for 400*l.* to the plaintiff, who after he had enjoyed the place three years, was turned out, and another put in his room; and as the bill supposed, by the defendant's means or procurement, without any fault of the plaintiff, which was not proved, it was insisted on by the defendant's counsel.

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1st. This is not a cause proper for the court to relieve. A contract of this nature being a bargain for a place or office of public trust and concern, viz. to take musters, &c. and though being concerned in military affairs, is out of the statute, yet the king may be abused, and false musters allowed.

2dly. He was displaced by the commissioners of the treasury.

3dly. Had enjoyed the place and salary 5s. *per diem*, and made other advantages. And the cause had been heard before the king at counsel-table, and no relief given him.

Lord Chancellor. I wish a law were that such bargains might not be, they occasion deceit to the king, &c. but seeing the king hath not disallowed them, the plaintiff shall not lose his money, and therefore what the defendant hath received, he shall repay.

Churchil in the debate took a difference between this bargain, for a place subject to such contingencies, where the party may be removed at pleasure, and a bargain of land on a defeasible title. *Ad quod non fuit respons.* but decreed it *ut supra*.

Perrie contra Roberts. 11 February, 1681.

A. was indebted to B. by bond, and C. bound as surety for A., and A. was likewise indebted to B. by contract in other money. A. and B. came to account of both debts, and stated *in toto* to be 84*l.* A. after in satisfaction of his debt, makes over certain goods of less value; but there was no declaration, whether the sale or money for the goods was to be in part of one debt or other, but generally. C. the surety would have it paid on the bond, and thereby to discharge him. B. the creditor, would take and make use of it as in satisfaction of the contract debt: for A. was insolvent, and so else he might lose his debt; and rather than so, he should apply the general payment to what debt he pleased, viz. to the satisfaction of the debt by contract, for which he had no other security; or else A. being now grown insolvent, he must lose it; and it were hard when he hath a just debt in law and equity to be expounded out of his debt by interpretation of a payment generally made.

General payment where two debts.

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Solicitor Finch. The sale was a farther security for both debts, and so for his bond-debt he hath two securities, the sale and the bond: and he who hath two securities may help himself upon either.

Lord Chancellor. If there had been two debts, and a sum of money be generally paid, the creditor may elect and choose after to what debt to apply it when on payment the debtor made no distinction how he paid it; but this payment being pursuant on a precedent account of both debts, the payment shall be intended according to the account, viz. on both debts, and so shall be proportioned ratably on both debts.

The Master of the Rolls had so ordered before, and his order being now disputed, was confirmed on rehearing, and the surety *pro rata* discharged.

Anonymus. 18 February, 1681.

No discovery of witnesses. Motion was made that the defendant might discover the names of the witnesses to a deed; by which the defendant claimed by his answer, which the plaintiff by bill charged to be antedated; but the antedating denied by answer.

Lord Chancellor. That may tend to prepare or otherwise to tamper with the witnesses, and therefore denied the motion; but if there were apparent suspicion, it may be.

Popley contra Popley. 20 February, 1681.

Alienee eased by the executor.

Declared by the Lord Chancellor, that not only the heir, in case he be charged with debts of the ancestor; but a devisee of the land shall be unburthened too of a debt lying on the land by the personal estate in the hands of an executor or administrator, and so shall a devisee of a mortgage. In the principal case the question was, whether a sum of money were a debt, or duty in law or equity, and being a charge in equity, a decree was that it shall be paid out of the personal estate, and lessen the widow's customary moiety in the province of York. If it were a debt in law or equity, then it should come in and be deducted in the first place, and lessen the widow's moiety; and being here a duty in equity, it was so decreed. But a legacy could not be so deducted.

Debt in equity.

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Howell contra Waldron. 24 February.

Lis pendens. Court ecclesiastical.

Legatee infant sueth in a court ecclesiastical, and pending that suit, sueth in Chancery: the former suit depending being pleaded, the plea was disallowed, for there is no such security for the infant's advantage as here, and possibly not for interest if placed out, and for bringing in account here, &c.

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DE TERM. PASCHÆ,

Anno Regis 34 Car. II.

IN CANCELLARIA.

Anonymus. 26 April, 1682.

William Bullock possessed of a lease for 1,000 years, on a treaty of marriage between him and Sir John Knight, to be had between Henry son of William, and Bridget daughter of Sir John Knight, assigns the lease to Sir John, &c. on trust; first, William to receive the profits till the marriage, then Henry to receive the profits so long as he shall live, and

no longer; then after his death Bridget to receive the profits during her life, and no longer; and afterward the issue of the said Henry and Bridget, between them to receive the profits so long as any issue of their bodies shall continue, with remainder over. The marriage is had, issue born, Henry assigns all his interest to his father, the issue dieth, Bridget dieth, William takes administration of Henry, Sir John Knight takes administration of Bridget and the issue. The question is *quid juris* on a bill exhibited by William and Sir John Knight, trustee and administrator of Bridget, and the issue.

On debate the Lord Chancellor ordered the assignment to be brought to him, (for some differences were alleged to be in the words of it,) and when he had perused it, he would declare his opinion.

1. The main question was, whether as this case is, the issue were a purchaser, or whether it were in the nature of a limitation.

2. If the assignment being *ut supra*, passed away the interest of the wife, if it were a limitation, 1st. In regard of the coverture, viz. the future interest and possibility (for it being made for her preferment in nature of a jointure, it was agreed it could not hurt her during her life.) But 2dly, whether this possibility were grantable.

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The following case cited by the Lord Chancellor in a cause of Bradburne contra Amand.

The Lord Dacres employed Crompe to purchase land for him, and to take up money to pay for it, which Crompe did, and took the purchase in his own name; the Lord Dacres sued Crompe in chancery, to have the lands on payment of the moneys, but Crompe on other occasions had mortgaged, engaged for, and on behalf of the Lord Dacres, and insisted for them also. And the Lord Dacres could not have a decree, but must pay the one moneys as well as the other by decree of the Lord Bridgman.

Pay all or none.

Hele contra Hele. April 28, 1682.

The bill was by the plaintiff, widow of Sir Henry Hele, to have a jointure of 300*l.* per annum settled on her, and the main questions on the case were two, viz. Sir Thomas Hele had three sons, Thomas, Samuel, and Henry the plaintiff's husband, and a brother Richard, father of the defendant Richard Hele. The estate was so settled, that Henry Hele the plaintiff's husband was seised in fee-simple of some lands, and of lands in Somersetshire which were his own inheritance; and on treaty with Mr. Elliott father of the plaintiff, for a

Jointure.
Marriage.

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marriage between him and Jane, the plaintiff, daughter of Elliott, it was agreed the marriage, &c. and near 3000*l.* portion; 1900*l.* of the portion was paid, and the rest secured, and Mr. Elliott took a bond of 6000*l.* to himself in trust for the plaintiff. The condition was in effect to settle on Jane 300*l.* per annum of lands in the county of Devonshire, Cornwall and Somersetshire, of the value of 300*l.* per an. but no particular lands expressed; Samuel, the elder brother of Henry, had by his will settled divers lands on trustees (defendants also) and gave power to Henry to make a jointure to such wife as he should marry of the Barton of Fleet Damaroll, (but he was tenant in tail of all) that Barton (except the capital messuage and some lands parcel thereof, value 50*l.* per annum) was entailed, so that Henry, who inherited that entail, had only such power on the capital messuage and those excepted lands.

Henry makes his will, and devises all the lands which he had to Richard, the defendant in tail, and dieth without issue, the lands which Richard hath by the will, &c. are of great annual value. But the plaintiff's portion, 3000*l.* paid, and no jointure made, for which she now sueth; and two objections (*intra alia* not so considerable) were made against her, viz.

1st. Though it be charged in the bill that there was an agreement precedent to the bond, that 300*l.* in lands should be settled in jointure, and after bond, &c. to settle it is particularly denied by the answer and insisted, and no proof made of it, and therefore the obligor had election to pay, or settle and avoid payment by settlement, and by chance might so declare, viz. that he would not be bound to settle, but would be at liberty, and we are content, the plaintiff take advantage of the penalty, but are not to be forced to the one, if content to submit to the penalty. Henry Hele could have no more imposed, *a fortiori*, nor the defendant.

Resp. 1. The bond is but a security for the jointure to be made, and of necessity supposeth a precedent agreement that such a jointure should be made: first, it is agreed what shall be done: in the second place, the treaty and agreement is, how that which is agreed on shall be secured, and in such case the security commonly is penal, but the penalty can never be demanded in equity, the party performing that, for non-doing whereof the security or penalty is given.

2. It is unreasonable that the obligor should be at liberty never to perform the thing secured, and the person secured, not able to ask the penalty as indeed he can never demand it in equity. If the obligor should sue in equity on the loss of his bond to have the penalty, it would be pain, and if he in equity ask in the disjunctive, that he might either have the penalty, the 6000*l.* or the jointure (supposing the lands were in

truth certain) chancery might decree the jointure, but would never decree the penalty, though the chancery would perhaps impose some other reasonable penalty on non-obedience, but certainly never decree the 6000*l.* unless the true value on disobedience amounted to as much.

3. And it is not reasonable nor equity, that in case of a marriage agreement, and the portion paid, that strictness of law should hold on one side, and the benefit to avoid it too, and the other side have no liberty; but if he should attempt to have the advantage in law of the penalty, to be stopped in equity when the other party would, and yet if he would be content with equity, not to be suffered to ask it though it be due.

4thly. The case is the same in equity, if the condition had been to have had certain lands for jointure, as when it is general; I say the same as to this objection.

Therefore, the principal scope of the parties being for a jointure, and the clear economy (pardon the expression) of the whole agreement being that, without all doubt the one or the other ought to be had, viz. the jointure or the penalty. If things be brought to that pass that one of the two is become impossible (that is, impracticable, or as circumstances of the particular case are, not accomplishable) then that part of the agreement which is feazable shall be performed.

Especially if it fall out to be in such state or condition, by the act, fault or negligence of the party who had once election to do otherwise; for such act or neglect determines the parties election at common law, and in reason and common justice; yea, though it fall out by the act of God or of a stranger, and without the parties fault; wherein I hold the differences to be two: first, between an agreement or covenant to do in the disjunctive one thing of two, and where there is a penal agreement to do one thing of two, as if I covenant to enfeoff a man, or make a jointure in possession of B. or W. and one of them is carried away by inevitable inundation or the like, yet I must do the other.

This is at law where no remedy is given but for the penalty: but in that case, if the agreement were without penalty, and the penalty for security, and to be reasonably intended so to be, there though an impossibility of one happen by the act of God, the chancery will pass by the penal and formal part, and insist on that which was the principal thing secured by the penalty: if the penalty were the principal, it were demandable in equity.

Now, in this particular case, as the circumstances of it fall out, Henry Hele who was to make the jointure, is fain into a condition as that he cannot perform the one part, viz. the pen-

ahy; for it is agreed that his debts exceed his personal estate, and his land he hath devised away, so that he cannot, morally considered, pay the 6000*l.* because there is nothing left; the thing cannot be done by him, so he hath no election to do it being in that condition.

Object. 2. The second objection is of more weight, viz. the covenant is general, not to settle black-acre of 300*l.* value per annum, but only to settle 300*l.* per annum in lands, so as Henry Hele might settle any lands in those counties, and the chancery could never with justice compel him to settle this or that land, if he would settle 300*l.* per annum any where within those counties.

I agree it so, as long as he could any way perform and settle 300*l.* per annum, but if he be once reduced to such condition and circumstances as that he could not possibly perform, and such impotency appear to the court judicially, the court may choose for him and enforce him to a particular, as if the time of settlement were past, and he aged or the like, the court may apply the general on his particular lands, as if he were an unthrift, &c.

Object. 3. But here the land is in Richard, the defendant, as a purchaser, not as heir, for he comes to the land by the will of Henry Hele, not as heir to him: though Henry was bound, and his heir would have been bound had the lands descended to him as heir; yet also in that case, if Richard had aliened the land before debt brought on the bond, the heir of Henry the obligor should not have been bound, and by no rule of law or precedent of the court is an assignee of land bound by a personal covenant, and the court will not make new precedents.

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Resp. The strength of this objection lieth in this, viz. that the agreement is not to settle any lands in particular, as black-acre, but generally any lands in Devonshire, Cornwall, &c. So as it is true, no lands of Henry were tied by this agreement, and therefore how can any of them be bound in the hands of his devisee?

Examine why is Henry and his devisee bound, in case the agreement had been of lands in particular, and Richard devisee of them. It is clear, Richard should have been bound in that case, and so should a purchaser of them if he had notice; yet in that case the land is not bound by the particular covenant no more than if it were general, else every alienee though for a valuable consideration and without notice, should be bound, but are not.

So that the particular covenant doth bind the covenantor in conscience, and the covenant general doth bind him as well and as much.

This case is now reduced to that plight, that Henry, who made this general covenant, had no means possibly to perform

the general at the time when he made the devise of the lands now in question, but out of these lands, for he had no personal estate, either to satisfy in money, or to procure or purchase other lands of the value. He makes his will, he is on his death-bed, shall the court imagine that he being obliged on so great consideration of 3000*l.* received by him in moneys, and security for the rest, and having no other means possible but by those lands to perform his covenant, and that to his wife whom he had lately married, and never offended him, to give his lands to a brother's son, and break his bond and conscience, and ruin and beggar such a wife?

I say, that being he had no other means but by these lands to perform his covenant, the court shall do what in conscience he ought to have done, and lay hands on these lands, seeing that there is left no other possibility.

Had Henry Hele been alive, he should be decreed in such circumstances to settle these lands, viz. 300*l.* per annum out of them; as the court, if he had been brought to a hearing, would not have given him time to purchase other lands, so the court at least would lay hold on these, if in convenient time or during life he did not, which differs a devisee from the heir; had he left them to Richard who was his heir he had been bound, he leaves them by his will to him, it is the same in effect.

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Object. The common law binds not the devisee, and it is a breach of law to bind the alienee, and there is no precedent, it will be a new one.

Resp. Is it not against law, or to say better, is it not more than the common law can do, to decree it, if the agreement were for particular lands? and yet at this day there would be no scruple in that case: the objection of the law is as strong in the one case as the other; in both the same.

4 & 5 M. There the covenant was by indenture to settle divers lands (*per nosme* :) it is there resolved, not only that the estate was not settled in law, but also *cui nul subpœna voila giser pur luy come pur cestuy que use de compeller l'estate d'estre execute quia party ad election al common ley per action de covenant*, in that and this case.

Observ. 1. No difference where the covenant is by name and where generally at the common law.

2. That surely 4 M. there was no precedent than where the agreement was *per nosme*.

3. That yet it is indubitable at this day to decree of particular.

4. That therefore when it was first done after 5 Mary, the court did not forbear to decree, though no precedent.

5. Nay, yet the court hath gone farther to the heir than to

the assignee, though a purchaser on valuable consideration if he had notice, and it is no defence for him to say that the covenantee had election to sue by covenant at common law.

It is harder on the plaintiff, for she hath no remedy: indeed she may sue, but to no purpose, for Richard the devisee and executor tells us and your lordship by his answer, viz. that he

[93] hath no assets.

Common law
relieves not
against a ge-
neral rule,
but chancery
does.

The common law relieves not particular cases against the general rule, but in chancery every particular case stands on its own particular circumstances; and though in general the law will not relieve, yet equity doth, so as the example introduce not a general mischief.

Here is a cause of as great equity, of as good consideration (marriage and portions) as can be, as singular in circumstance, where the whole estate, the defendant hath, come to him by mere liberality. 1. The liberality of him who was not *pro arbitrio* to make the jointure, but *ex justitiæ merito*.

This case is not like to be a precedent.

Company of Stationers, 29 April. Ante.

Injunction.
Prerogative.
Statute.

The king granted the sole printing of English Bibles and statute-books to the plaintiff: the defendant traded with certain Dutchmen, who printed many thousands of them in Holland, and the same were now in the custom-house; and formerly on a bill exhibited in chancery, the plaintiff had an injunction against the defendant not to import or vend the same books, in regard it was not only a breach of the king's prerogative, but of great and public consequence for strangers to print and vend in England our statutes and laws, if safely done. And now I moved for explanation of the order, &c. and injunction; for the defendant had acknowledged judgment, or judgments were obtained against him, and also a commission of bankrupt was prosecuting, and there was pretence that those who came in by such judgment or commission, should not be bound by the injunction.

The Lord Chancellor declared they should be bound; and farther ordered, that in regard divers of the books were in the hands of the customers, the customers should suffer none of them to be removed thence: and that they first acquaint the court, and an injunction granted accordingly.

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Portion.

Row contra Tillier.

Condition.

The father seised in fee of copyhold lands, surrendered them by the hands of two tenants, viz. J. S. and his own brother Tillier father of the defendant, and now dead, to the use of his brother Tillier and his heirs, on condition that Tillier paid to Katharine, the only child of the survivor, when

she comes to the age of twenty-one, 200*l.* provided if his daughter died without heirs of her body, then Tillier the brother should have the 200*l.* The father survivor died, leaving his daughter an infant not two years old. The daughter at 18 years married the plaintiff, and had issue George, and died when she was 30 years and an half. The son died an infant; the plaintiff, husband of Katherine, the daughter, and father of the child, takes administration to them both, and sueth the son and heir of the *cestuy a que*; the surrender was made for the 200*l.* who insists that the money is not due, because the daughter never came to twenty-one, according to the condition. Pasch. 1682, the 200*l.* decreed to the plaintiff.

The father gave his personal estate of good value to his said brother, but nothing else of his own to his said only child.

Harding contra Edge. 13 May.

A decree was made by commissioners on the statute of 43 Eliz. for charity, against Harding; who took exception against it in chancery, and then being seised of lands, conveyed them to raise portions for his children after the commissioners' decree was confirmed in chancery, the conveyance was with power of revocation: this shall not hinder execution for the money decreed, but the lands aliened shall be sequestered for the money, and a *scire facias* against Harding's heir; for the exceptant died after the decree confirmed; the conveyance was mean between the two decrees.

Charitable
uses.
Decree.
Alienec.

Brooks contra Bradley. 11 May, 1682.

[95]

The bill was to have a discovery of gold, and a great quantity of goods which the defendant took out of the plaintiff's ship; which goods and ship the defendant took on the sea.

African com-
pany.

The defendant sets forth, the charter made by the king to the African Company of the sole trade in those parts on the Guinea coast, and empowering them to seize the ships and goods of any that should trade in those parts; and justified under the patent what he did, and denied to make any discovery.

The plaintiff's counsel offering to wave the plea, and demurrer:

Lord Chancellor. If you can help yourselves at law, do so; but I give no assistance to discover here in prejudice of the king's charter.

Pamplin contra Green. 11 May, 1683.

Distribution.
Jurisdiction
Ecclesiasti-
cal. Stat. 27.
Car. 2.

The bill is against an administrator and other persons, to have distribution of the intestate's estate, according to the late statute; which statute the defendant pleaded, and that by that statute the ordinary is made the judge to distribute, and is appointed to take security: and therefore the plaintiff ought to sue there, and not here.

The Lord Chancellor over-ruled the plea, and ordered that the defendants should answer.

Sir Charles Lee & Ux. contra Sir John Boles, Administrator to his deceased Wife. 1682.

[96] The defendant had verdict and judgment against the now plaintiffs, who now after the judgment sought to be relieved against the judgment, and the case on hearing was, viz. the said Sir John Boles became a suitor to the plaintiff's daughter, who was informed that his estate in lands was 1700*l.* per annum, and free from all incumbrances, except 7,000*l.* for a daughter's portion, to his daughter by a former wife, then sick. The mother, the lady Lee, informed him that her daughter's portion, left her by her father deceased, was 2,000*l.* but she would add 2,000*l.* more, and so pay the said Boles 4,000*l.* and would give her daughter a 1,000*l.* more, and 60*l.* per annum for two years, if his estate was such; and articles were mutually executed, by which it was in the head, and other places of the articles, recited and expressed that the daughter's portion was 4,000*l.* but there was a distinct article, that if no act were done or suffered before the first of November, 1668, whereby the heir male of Sir John Boles, by the plaintiff's daughter, might be hindered from enjoying the lands by the articles agreed to be settled on them, then the mother would pay to Sir Vincent Corbet and Robert Corbet, 1,000*l.* and 60*l.* per annum, for two years for the sole and proper use of her daughter, and Sir John Boles not to meddle with it: there were other articles for jointure, &c. and settlement on the heirs male; but the lady finding that the lands were incumbered, would not suffer the marriage to proceed. Thereupon Boles and the young daughter agreed with the mother to release the 1,000*l.* and did make a full release and discharge thereof, referring to the articles touching the payment thereof: but this though in writing, and subscribed by Sir John Boles and the daughter, was not sealed; the daughter was of full age; the marriage was had, but the lands were incumbered 2,000*l.* of the portion being unpaid, a suit was in chancery; which by mediation of the court was composed, the 2,000*l.* paid, lands of 1200*l.* per annum settled, and

so all things quiet : but the wife being dead, Sir John Boles takes administration, and sues Sir Charles Lee and his lady for the 1,000*l.* in an action of covenant, whereon the said release (not being under seal) could not be pleaded ; but the 1,000*l.* not being payable by the articles unless the land was free, *ut supra* ; and finding a mortgage made by the father of Sir John Boles that incumbered the lands, and that Sir John Boles always received the profits thereof, which gave occasion to the plaintiff's heir to believe those lands to be Sir John Boles's, and they by way of bar to the covenant ; that matter was pleaded, viz. that those lands were incumbered, and showed how : but it being insisted then that the said lands were not the lands of Sir John Boles 'in law or equity, the mortgage being unsatisfied, for they were the mortgagee's lands in law and equity till he was paid, and so the article in generality comprehended not those lands.

Verdict.

Mistake.

[97]

The verdict passed for the then plaintiff, and the note was given in evidence to the jury in mitigation of damages : therefore the defendant insisted, that after verdict and judgment in an action of covenant, wherein damages are only recovered, the suit is not to be allowed in this court.

1st. For the now plaintiff it was pressed, that this 1000*l.* was a voluntary gift and liberality of the mother, and given and covenanted to be paid only on precedent condition, viz. if no incumbrance (that might prejudice the heir male,) were, but now the lands appeared to be incumbered.

2dly. Though in strictness of law an agreement to discharge a duty created under hand and seal, is not good in law ; yet in natural justice it is all one as to the conscience of the parties, where there is no fraud or practice, nor surprise in obtaining it, much more when there is a consideration or just reason for it, as here there was, viz. consenting to the proceeding of the marriage, which was justly stopped by the lady, being informed of the incumbrance. And it is adjudged at law that in consideration the father or the mother shall consent to the marriage of a child, it is good to raise a use or action on the case.

3dly. The reason why the law requires a seal and solemnity is, that the thing be *certi juris*, and to prevent surprise, of which here is no doubt. The defendant confesseth the fact, though he swears also that he meant not to abide by it, or to that effect, so the fraud lies on his side ; he meant not to do in effect what he did in show do.

4thly. The verdict was on a mistake, whereinto the plaintiff was led by the defendant, for he kept possession, and received the rents, &c. which made the plaintiff take him for owner of the land ; and the plaintiff now, then defendant,

could at law assign but one breach, viz. one incumbrance, though there were many, and are now proved; and if any incumbrance were, he had no title to the 1000*l.* and it is no reason that the strictness of the law tying the plaintiff to one breach, should entitle the now defendant to that to which now it appears he never had title, because there were more incumbrances, so in truth he never had title.

The Lord Chancellor, after long debate, dismissed the bill, principally because the plaintiff did not come into the court till after the verdict and judgment. And the Chancellor took notice that the settlement made was more beneficial than the settlement propounded in the articles; but that was ordered after the condition broken, viz. not discharging the incumbrance six years after the time when, &c.

Rauson contra Sasheverel. 13 May.

Pay all.
Feme covert.
Mortgage.
Surcharge.

Sasheverel and his wife seised in right of the wife, by fine and deed mortgaged them for 340*l.* which was not paid at the day, but 200*l.* part was paid afterward, and then the mortgagor had occasion to borrow, and did borrow other money of the same mortgagee. The first money, viz. the payment of the 200*l.* was endorsed on the mortgage-deed; the wife, in presence of the husband made account of what was due on the first and second loan, for both by agreement were to be on security of the mortgage. The wife died, but no new fine levied on the second loan.

And therefore it is objected, that neither her nor the husband's consent, shall bind her heir.

The Lord Chancellor *e contra*: for the mortgagee hath good title in law, and as much equity to the money as the heir hath to the land, *pour que*, &c.

Brond contra Brond. 19 May.

Jointress re-
deems, &c.
paying a
third part.
Mortgage.
Baron and
Feme.
Limitation.

[99]

Thomas Brond, late husband of the plaintiff, in consideration of 3000*l.* settled, *inter alia*, houses in Bread-street, in all of the value of 360*l.* per annum, to the use of himself for life, remainder to the plaintiff for life, for her jointure, with remainder over. The houses *anno* 1666, were burnt, and the husband being unable to rebuild them, without borrowing money, persuaded the plaintiff to join with him in a fine *sur concessit*, for a long term of years, to secure the money to be borrowed; and agreed with the plaintiff that it should be no prejudice to her, but that she should redeem, paying the interest of the money borrowed. 600*l.* was borrowed of Alderman Jefferies, and a fine levied to him for 99 years, by the plaintiff and her husband. Jefferies redemised the tofts of the burnt houses to the husband for 98 years, rendering 36*l.*

per annum, and to repay the 600*l.* at a time, &c. the houses are rebuilt by the husband, who afterwards settles them and other his lands on himself in tail, to the heirs male of his body, the remainder in tail to the defendant, his brother, charged with portions of 3000*l.* to his daughters, and dieth, *anno* 1674, and made the defendant his executor, being his brother, his personal estate but 182*l.* short of his debts. The defendant was bound for him in bonds to the value of 1600*l.* and entered on the houses, paid the 1600*l.* and took up the bonds; and also paid the interest of the 600*l.* borrowed till 1681, and then the plaintiff exhibited the bill to redeem, for that the houses yield 180*l.* per annum, and the rents received by the defendant were more than the money borrowed, and her jointure now left but 200*l.* per annum, besides the houses; and prays that she may redeem, paying proportionably, and hold over till that she be repaid, with interest.

E contra. It was alleged, and that the truth was, that she never questioned the matter in 13 years; during all which time the defendant paid interest, and paid the 1600*l.* which was the brother's debt, and the houses redemised, came to him as executor of his brother, and were assets in his hands; so that in law the same was liable to pay debts, and in equity he ought not to be liable to his brother's debts; and the plaintiff's title was but a parol agreement between husband and wife, and the defendant never had notice of any such agreement till this bill exhibited, *anno* 1681.

The plaintiff's counsel replied, that when she joined in the fine with her husband, the equity of the redemption did properly belong to her, and her husband could not discharge if by any subsequent act or agreement beyond the mortgage money and interest, unless it were for valuable considerations to one who had no notice of her title; but the defendant is no purchaser, but comes in only as executor, and paid no money for the lease. Therefore prayed that she might be admitted to redeem from the mortgagee, that the profits and rents which the defendant had received *ultra* the interest might be accounted to her as belonging to her for her jointure.

[100]

The Lord Chancellor, after much debate, decreed, that she should have the redemption, paying a third part of the principal money, but should have no profits received by the defendant, till the bill exhibited, 1681, which was the first time he had notice of the agreement. And the plaintiff was to pay the other two parts of the principal, and the executrix, the wife, to be reimbursed in case she died, if she paid more than the third part. The mortgagee was party to the bill.

Hammond contra Shelly.

Commission
to examine
contempt
sworn, viz.
process ser-
ved.

The defendant was decreed to pay the plaintiff 400*l.* and being examined for non-payment, denied the service of the process; and the parties living in Plymouth, the plaintiff had a commission to prove the contempt, and proved it positively by one witness. The defendant prayed a commission to examine touching the contempt, alleging to the court that the truth was, that the defendant was never served, but sick in her bed at the time when the service was pretended to be made; and that her sister going to the door when he that served the process knocked, he served her instead of the defendant.

The plaintiff much opposed this commission, but my Lord Chancellor granted the motion, for it was not known whether it was served, but whether it was mis-served; and said it was no reason she should lose her liberty upon a mistake of serving process.

Paget contra Paget, &c.

[101]

Thomas Lord Paget deceased, having several sons, whereof the plaintiff was one, he by good assurance appointed *inter alia*, 12000*l.* to be for portions of the younger sons, the plaintiff's proportion thereof came to 2000*l.* or thereabout; but he became indebted and had spent 400*l.* which he desired one of the defendants, the now Lord Paget, to pay him out of his portion, which was in the defendant's hands, and to relieve him he was contented to do, so as out of the rest, provision might be made for his children, to be laid out in lands; for it was feared that he might waste the rest: and articles were entered into accordingly, that the rest should be so laid out; but the plaintiff being farther indebted, he sues to have some farther proportion; for he might better provide for himself and family, if he might be supplied with 500*l.* to buy an office, and 100*l.* to pay his debts.

The Lord Paget submitted to the judgment of the court, and was willing to pay the money into court, or as the court should order.

Chancery.
Feme covert
examined.
Consent, &c.

The Lord Chancellor propounded often to the defendant's counsel what sum should be paid.

They said they might not consent: the articles were that it must be laid out in land; and the wife was concerned, and no party to the bill. The wife happened to be in court, and said she desired the money might be laid out as her husband had prayed; and being examined by the Lord Chancellor, answered accordingly.

Whereupon the Lord Chancellor decreed that 600*l.* should

be paid, viz. 100*l.* to pay debts, and 500*l.* to be laid out to buy an office, but not to be paid to the plaintiff himself, but for an office; and in the mean time the Lord Paget to pay the interest, for he did offer to pay the whole into court, or keep it at interest. And it was farther ordered that the plaintiff should procure the office within months.

Quære, if the office be bought and the husband die; *quid*.

Mildmay contra Mildmay, &c.

The plaintiff, wife to the defendant, and Coward, her trustee, sue to have performance of an agreement made under hand and seal; by which the defendant granted to Coward, whose executor the plaintiff Coward is, all his rents of his manor of East-Camel in the county of Somerset, *habendum* for years, if the wife lived so long, for the sole use of the wife; and if the rents failed by the death of tenants, whereby the lands might decay, he would continue payment, and enforced her demand, because the ecclesiastical court had given her alimony, but less than they would have otherwise given her in respect of this grant; and for farther equity, that the defendant had bought in some of the tenants' estates, whereby the rents could not be recovered at law.

The objections were:

1st. That the grant was after marriage, and voluntary; for her portion being 1200*l.* she had on marriage a jointure of 100*l.* per annum settled; and the grant in question was made two years after, and the rent was duly paid till she un-
[102]
Conveyance in trust by the husband for his wife. Baron and Feme. Agreement. Elopement.

2dly. The case of itself is not a case for this court to favour; and to decree for the wife against the husband, is to give her power over her husband, or his estate, by a voluntary agreement of the husband.

The Lord Chancellor decreed that the plaintiff shall not be barred to sue in her trustee's name: and that the surrender or discharge of the rent by the husband, shall not be made use of.

White contra Small.

Decree that conveyances made to the defendant by Elizabeth Marchant, of an equity of redemption, be set aside; the bill being grounded on meekness and lunacy of Elizabeth, the plaintiff's cousin-german, and heir to Elizabeth; the defendant, cousin-german, in the same degree. No proof of lunacy; but she was weak of understanding, she could read, and taught a child to read: two days after the deed, she said she had made it to the end the defendant should have the land; yet because the former communication of such grant.
[103]
Conveyance voluntary made by a person weak though not lunatic avoided.

was before, and no consideration in the deed, but fraud—
to be prepared and obtruded on Elizabeth. It was set aside
by the Lord Chancellor.

DE TERM. SANCT. TRIN.

Anno Regis 34 Car II.

IN CANCELLARIA.

Domina Dacres contra Chall. Chute. 15 June, 1682.

Jointure.
Sequestra-
tion.

Chall. Chute, grandfather to the defendant, and husband to the plaintiff, by deed covenanted to settle on the plaintiff a jointure of 500*l.* per annum, or leave her 5,000*l.* He failed to make the jointure, and died: the plaintiff obtained formerly a decree for the 5000*l.* with damages, against Chall. Chute, father of the defendant, who dying, the bill was revived against the defendant as heir to his father and grandfather, and against Mr. Barker and Mr. Leonard, his uncles and guardians. There was so far proceedings against Chall. Chute the father, that a sequestration of the vine and other lands was ordered, and Owen and three other sequestrators were named. The cause coming to be heard against the defendants, the bill being for the 5,000*l.* damages:

[105]

The counsel for Chall. Chute, then defendant, informed the court that there were many debts on the estate; and two younger sons and a daughter of the defendant's father, that had no maintenance, a statute of 3,000*l.* to the lady Anglesey, acknowledged by the defendant's father for payment of 400*l.* per annum, to the lady Anglesey for her life; and if the lady Anglesey should lay hold on the personal estate, the family would be ruined, the younger children unprovided for, the debts insuperable, and therefore the defendant's counsel propounded for remedy that the plaintiff, the lady Dacres, should not lay on the sequestration on the whole lands, but suffer the lady Anglesey to enjoy part; for though her statute bound the defendant, (being acknowledged by him) yet it was subsequent to the plaintiff's demand, grounded on the grandfather's covenant, and some other things, and propounded that 40*l.* a piece might be paid for the young children; and after debts paid, and these things done, the defendant should have the surplus. Mr. Barker and Leonard, the guardians of the defendant, and the plaintiff not opposing, it is so decreed, and Mr. Owen (which was part of the proposal) to receive and dispose of all, and 20*l.* per annum salary to be allowed to him; and accordingly the court decreed it. The

children's maintenance was raised and disposed of by Owen, as well as the other matters and payments to the plaintiff, towards her satisfaction of her 5,000*l.* with damages: Owen to take administration of the personal estate, and apply the same to the other debts, which he did: and the maintenances of the three young children, amounting to 120*l.* per annum, was by Owen paid, some part to the children's own hands, and the rest to the plaintiff for them, who educated them therewith, paid for their schooling, cloathing, &c. and brought them up very well; and Owen accounted still to Mr. Barker of those and the other payments. Mr. Barker subscribed and allowed the accounts, and so matters continued and were transacted for many years, viz. about twelve years.

And then Chall. Chute, the grand-child, appealed to the lords in parliament against the decree; and among other points, insisted that he ought not to have been charged with the maintenance of 40*l.* per annum, to his younger brothers and sisters. And as to that point the lords in parliament adjudged, that the clause in the said decree touching the maintenance of the young children, be reversed and annulled; *inter alia*, they confirm the first decree made for the lady's 5,000*l.* with damages. They order, &c. that the plaintiff account for what hath been received by her.

Afterwards the plaintiff exhibits this bill, for that Chall. Chute, the father, had made a will, which was in Mr. Barker's hand and concealed; wherein he made Barker and Leonard the uncles, guardians to all his children, and his executors; and as she alleged, he had provided for maintenance for the younger children thereby, and therefore she ought not to be charged with the maintenances; for the defendant pretended that the moneys received by her from Owen out of his estate, ought to be charged on her account, and to sink her principal debt, with proportionable damages from time to time: and on this depended the resolution of an exception to the master's report, who stated the account as to this matter, especially touching that point.

[106]

Now the will was read as before, but though the uncles were made thereby guardians and executors, nothing could be thence enforced to the point of the maintenances.

The point debated before the Lord Chancellor was, whether the plaintiff should be charged with the money received by her from Owen for the children's maintenance, amounting to 1200*l.* which with interest came to 2,000*l.* or thereabouts?

The defendant's counsel now insisted that she should;

1st. For she was their grand-mother, (which was true, for Chall. Chute their father married her daughter their mother) and therefore she by law ought to have maintained them.

2dly. It was her agent that received the moneys, and paid the same to her.

3dly. The lords order is express, that she is to account for what she received ; but this maintenance money was received by her.

The plaintiff's counsel answered ;

1st. She is not bound to maintain her grand-children more than the defendant is to maintain his brothers, and no law binds her to it.

2dly. Owen is not her agent, but the agent, of the court, and of the creditors, and of the defendant: he is appointed receiver for all persons, and that by the court, and this done at the proposal of the defendant for his benefit, and to preserve him and his family ; for the plaintiff suffered prejudice by it, viz. delay in payment of her 5,000*l.* for satisfaction whereof she had a sequestration. And,

[107] 3dly. The order of the lords, that she should account for what she received, must be intended of so much as she received to her own use, but not of what was paid to her only for the children.

Owen received for the children, and paid it all for them, and much into their own hands, and it is not more just to charge the lady than Owen with it. And the receipt and employment of the money was by virtue of, and in obedience to a decree of the court while it was in force, which decree was at the defendant's motion by his counsel, and for his advantage, not the plaintiff's ; and after the decree the plaintiff nor Owen could not avoid obedience to it, and no man must suffer for his obedience ; and if the court erred in this, they ought to make restitution who received the benefit of that error, viz. either the younger children who enjoyed it, or the defendant, whose counsel moved it, and procured it for the benefit of the defendant, and his uncle and guardians were parties to the suit, and were present in court, and consented to the decree as much as the plaintiffs, viz. she nor they did not oppose it. And more ; for it cannot be conceived that the infant children made the proposition to the court, but rather Barker and Leonard, guardians ; and if it had been for the disadvantage of the defendant, to whom they were guardians, their duty was to have opposed it. And when an erroneous decree is made in behalf of any one, and an agent appointed to manage it for such person, and it be done, when such decree comes to be reversed, restitution must be from that person for whose benefit the decree was, and not from the agent.

The Lord Chancellor, in the debate, seemed very inclinable to relieve the lady ; for he declared that the lady as grand-

mother was not bound to maintain the grandchildren, but as justice should order, &c. frequently pressed the defendant whether he would not at least do something for his brothers, &c. Declared at last he saw no equity nor ground to charge the lady, &c. and the decree while unreversed, was to be obeyed. And as this case was circumstanced, the court, when a family is to be preserved, younger children kept from being starved and undone, and care taken by consent of the persons and friends in it, and an estate able to bear it; if this should be undone, all such cares and providence of the court would be lost, and those already made, reversed, which would be inconvenient. But he said, I am to obey the order which limits me; and so as to this part relieved not the plaintiff.

[108]

Dyer contra Dyer. 17 June, 1682.

The defendant's father granted to J. D. a rent-charge of 100*l.* out of certain lands mentioned in the bill under power of revocation. The plaintiff treated with J. D. to purchase the rent, which the defendant for twelve years continually paid to J. D. The plaintiff informed the defendant that he was in treaty to purchase the rent, and inquired of the defendant whether such grant was made, and whether it had been so paid, and whether it were revoked or not, and the bill chargeth it so. And that the defendant confesseth the grant and payment, and that it was not revoked to his knowledge. Thereupon the plaintiff purchased the annuity for 2000*l.* All this the defendant in his answer confessed. But whereas the plaintiff in his bill charged also that the defendant promised payment, he denieth any promise. The cause was brought to hearing on bill and answer.

Purchaser.
Encourage-
ment
by one who
had title.
Ignorance.
Postea,
Hobbs contra
Norton.

And Mr. Solicitor, the plaintiff's counsel, pressed for a decree.

The Attorney-General moved that the cause might be put off till a cross cause might be brought in, which would be ready, &c. Which cause was to discover settlements made by the grandfather on marriage, by which the defendant's father could not make such grant. Which settlements were concealed, and kept from the defendant.

Mr. Solicitor. Be your title what it will, it will not hurt the plaintiff, who acquainted you with his intent to purchase, and you confess payment, &c. so you have thereby encouraged and drawn us into the purchase, and we have paid fully for it.

Attorney-General. We told you nothing but the truth, and were ignorant then of our own title; our ignorance must not prejudice us; if we had misinformed you, or having a title and knowing it, concealed it, that might alter the case.

Ignorance of
a man's title
shall not pre-
judice it.

Lord Chancellor. Ignorance of his title differs the case, therefore put off the hearing, &c.

Booth contra Booth.

Forfeiture. The uncle, by lease and release, settled the lands in question to the use of himself for life, remainder to Humphrey, the plaintiff, for life, remainder to his sons, first, second, third and fourth in tail; the remainder to the defendant for life; remainder to his first, second, &c. sons, with power of revocation, and a *proviso* if Humphrey marry without consent of the uncle, during his life, and after his death, of A. B. &c. then the uses limited to Humphrey and his sons to cease, and then to the use of the defendant. He married without consent, having no notice of the conveyance or *proviso*. But his uncle (who knew not of the marriage,) entertained him kindly, and gave legacies to him by his will, and died. The defendant disturbs the plaintiff because of the forfeiture, and dismissed to law.

But the Chancellor asked if it were a limitation of a trust, or of an use?

Resp. Use. Chancellor. Then it is at law.

Anonymus. 3 July.

Will attested by three witnesses, the request of the testator, but were not present at once together, is a good will within the statute.

Anonymus. The same day.

Debts devised to be paid out of real and personal estate. A man devised his debts to be paid out of his real and personal estate; the executor paid more than his personal estate, he shall be reimbursed out of the real estate.

Herring contra Walround. The same day.

[110]
A monster shown for money, misdemeanor.

Herring, anno 1681, was delivered of two female children, they were baptized by the names of Aquila and Priscilla. The birth was monstrous, for they had two heads, four arms, four legs, and but one belly, where their two bodies were conjoined. The birth was at Ilbremers, in the county of Somerset. Many people came daily to see them, and gave money to the parents; the father was a poor cottage tenant to Mr. Walround, a justice of the peace, who, and the father, entered into articles that Walround should have the custody of the children, and the benefit that was to be made by showing of them; but was to pay the plaintiff one eighth part of

that benefit, and to maintain the plaintiff, his wife and children (for he had other children,) so long as Aquila and Priscilla lived. The bill complains that the articles were gotten from the plaintiff by surprise, being prepared, &c. but the contrary was proved. The children lived but a month, and then after the bill being exhibited to be relieved against the bond and articles, and an account of the moneys received by the defendant for showing the children, which the defendant had embalmed, and cause to be still kept.

201. bonds mutually to perform articles.

The Chancellor much disliked the doings, decreed the defendant to bury the children within a week, and to account for what he or his agents had received, and full costs of the whole suit to the plaintiff; who (her husband, the plaintiff, being dead,) did revive the bill.

Collett contra Collett. The same day.

William Fox, gent. having issue three daughters; Mary Goodwin, widow, Elizabeth, late wife of Samuel Collett, and Martha, late wife of Cornelius Collett, by his last will, dated the 27th of September, 1679, among other things, deviseth as followeth:

And as to the residue and overplus of his personal estate, concludes his will in these words:

I will that after my debts which I shall owe at the time of my decease, and my funeral expenses, and the probate of this my will be discharged and paid; then I do give all the rest of my personal estate unbequeathed, to purchase an estate near of as good value as the same personal estate shall amount unto, within one year next after my decease: which said estate so to be purchased, I will, shall be settled and assured unto, and upon my said three daughters, Mary, Elizabeth and Martha, and the heirs of their respective bodies lawfully begotten, for ever; or otherwise my said daughter Mary, and the husbands of my said two other daughters, Elizabeth and Martha, shall for such moneys as they shall receive of my said executors, for the overplus of my personal estate, to enter into one or more bonds, of the double sum of money as each part shall amount unto, the same being to be divided into three parts, unto my said executors within eighteen months next after my decease, to settle and assure such part or sum of moneys as each of them shall receive; and by this my will for the overplus of my personal estate, unto and upon the child and children of my said three daughters, Mary, Elizabeth, and Martha, part and part alike.

[111]

Residuum to be laid out in purchases &c.

Martha, the wife of Cornelius Collett, died about half a year after the testator, her father, leaving issue a daughter, which daughter died about four months after the mother; the other

two sisters, viz. Mary and Elizabeth surviving, Cornelius Collett took letters of administration as well of the said Martha his wife, as to his said daughter.

No land or estate was purchased with the 400*l.* or the overplus of the personal estate given to Martha.

The question was, whether the plaintiff who was administrator both to his wife and child, was entitled to the third, or any part of the residue of the testator's estate?

The Lord Chancellor dismissed the bill, and declared he had no part therein, nor in right of his wife, because she died; and by the first part of the clause it was to be laid out in land, to be settled on the three daughters, and the heirs of their three bodies: and by the second clause Mary and the husbands of Elizabeth and Martha, are to secure what they receive, &c. *pro ut.*

Nota. In the last case it was moved, that if land had been purchased and settled to the wife in tail, the plaintiff should have been tenant by the courtesy, and therefore should have recompense; *sed non allocatur.*

Clayton contra Duke of Newcastle. July, 1682.

The heir sells in the life of the ancestor, and receives the money. The ancestor dieth, the heir is decre'd to convey.

The Earl of Newcastle purchased Clipston in the county of Nottingham, to him and to Sir Charles Cavendish in fee, in trust for himself and his heirs; the rest of his manors and lands by recoveries and deeds, he settled in trustees for himself for life, and to pay debts and raise portions after his death: and the wars falling out, he went beyond sea, in which time, viz. of his abode there, the Lord Mansfield, his heir apparent, and Henry, his son, and now duke, acted on the earl's behalf, sold Clipston to Wakefield in fee for a full consideration, in trust for William Clayton: the conveyance was made by the Lord Mansfield, and Henry, his son, now duke, and by Rolleston, who was then the surviving trustee in the great settlement aforesaid, but was not estated in Clipston, for that was not comprised in that settlement; but the legal estate was in the earl and Sir Charles Cavendish, and the purchase money was duly paid to the venders, and part paid by them for a daughter's portion.

Wakefield and William Clayton, for whom J. S. was trustee, on treaty of a marriage to be had, and portion, covenants to settle Clipston, *inter alia*, on the plaintiff himself, with remainder, &c. to the first, second, &c. sons in tail, &c. and a settlement (*till quel*) made accordingly, and possession accordingly, enjoyed till 1660, when the earl returned into England and entered on the estate, and divers suits arise between the earl and Clayton; they both die, the Lord Mansfield dieth, the now duke heir to them both being in possession: Clayton,

wife of William, sueth to be relieved for Clipston, being made to her in jointure, but opposed by the now duke, on two grounds.

1st. By certain articles made between the earl and Clayton, whereby Clayton was to convey Clipston, &c. *inter alia*, to the earl; but as to them the court in a cause lately heard between the now duke, then plaintiff, &c. to have the articles performed, and 6000*l.* paid according to those articles; had set them aside, because they were waved, and new agreements made, and other reasons, and the duke's bill dismissed.

2dly. Because the persons who contracted with, and conveyed to Wakefield, had no estate in them, nor were trusted by the earl to sell; but the estate in fee of Clipston was in the earl himself, and Sir Charles Cavendish in trust for the earl; and Sir Charles Cavendish died, and the earl surviving, the whole legal estate did vest in the earl, and is come by descent to the now duke as heir to the Lord Mansfield; and the earl and he had the legal estate in law and equity also; whereas Mrs Clayton, the plaintiff, had only equity with her, (if so much.) And then where law and equity is, it will prevail against equity without law.

And the defendants deny that the earl ever gave any authority for the sale of Clipston, or knew of the sale, or employment of that money; but that during his exile, he was maintained by his brother, and that the earl by his entry was estated in his first right, and no way bound by what was done of others.

E contra, that the now duke having taken upon him to convey, and conveyed the lands by indenture under his hand and seal, as also the Lord Mansfield did; and receiving the purchase money, and employed it for the benefit of the family, and having now no title, but as heir now that he is come to be owner of the lands he sold, he shall be bound to make good the sale; and accordingly the Lord Chancellor decreed it

In the hearing of the cause, offer was made to read proofs, to support the articles, because there was no decree in the other cause, but only a dismission; but the Lord Chancellor did not admit it.

Bullock contra Knight. 14 July.

The case was.

William Bullock being possessed of a lease for a thousand years, of the lands in question, in consideration of a marriage to be had between Henry Bullock, his eldest son, and Bridget, daughter of Sir John Knight, granted the same term to Sir John Knight, &c. in trust, that William Bullock should receive the profits till the marriage, and after the marriage to

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Term not entailed.

Trust to A. for A. the issue of A. so long as issue continued. A. sells the term, it is good.

permit Henry Bullock, the son, and his assigns, to hold the premises, and receive the profits so long of the said term as he should live, and no longer; and after his decease and marriage, should permit the said Bridget, and her assigns, to hold and enjoy the premises, and receive the profits so long of the said term as she should live, and no longer; and after the said marriage, and decease of the survivor, the said Henry and Bridget should permit the premises to be enjoyed as followeth, but not otherwise, or in any other manner: viz. by the issues of the bodies of the said Henry and Bridget, between them to be begotten, for and during so long time of the said term as such issue should have a being, and continue in *rerum natura*, to take and enjoy in like manner as heirs in special tail by course of descent to hold and enjoy; and for default of such issue, should permit the said Henry, his executors, &c. to enjoy the premises, and receive the profits to the end of the term. Henry and Bridget had issue, Henry and John, who died both without issue in the life of Henry the father. Henry the father assigns to William all his interest which belonged to him, to William Bullock, *habendum* after the death of himself, and of Bridget, and of the children of Henry and Bridget, and dies: Bridget survives him; Sir John Knight takes administration to Henry, the son of Henry, Bridget takes administration to John, the son of Henry; Sir John Knight assigns to Bridget, Bridget assigns to Ann, the defendant; upon whose plea and the bill, all this matter appears: John Bullock, the plaintiff, claims by the said deed of William Bullock, and his executors.

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The Lord Chancellor took time to advise, and now, the 14th of July, 1682, heard counsel again, and declared that the limitation to the issue, *ut supra*, vested the estate in Henry and Bridget, and not in the issue. And Ann had a good title, and allowed the plea.

Culpepper contra Aston. Et e contra.

Sir Thomas Culpepper, father of the plaintiff, seised in fee of lands in Plumpsted, &c. by his last will in writing devised, (viz.) I give to my daughter Ruperta 1000*l.* to be paid at her age of 18 years, or marriage, and to be levied out of all those sums of money due from his majesty for the wardships of Philips, &c. and the residue thereof to my son Thomas, and that for payment of his debts, his lands in Plumpsted, &c. shall be sold by my executor; and my meaning is, that if all my debts, and the said 1000*l.* may be raised as afore-said, or out of the rents and profits of my lands, tenements and hereditaments, then my lands in Plumpsted, &c. shall be conveyed to my son Thomas and his heirs. And three or

four days after, the 9th of March, 1662, by lease and release, conveys the lands in Plumsted, &c. to Sir Nicholas Crispe and Henry Culpepper, to pay his debts. Sir Thomas Culpepper died. Thomas, the plaintiff, being his heir, exhibits a bill to be relived and to have the land, supposing there was sufficient to pay all, without sale of Plumsted, &c. Cross bills were exhibited.

1st. The Lord Chancellor declared, that when lands are appointed or conveyed to pay debts, the heir is entitled to have the lands after the debts paid.

2dly. A purchaser buying the lands is not concerned whether there be sufficiency or not : but if he buy and pay, though there were sufficiency to pay the debts out of the personal estate, that yet he should hold the lands against the heir, and the heir must take his remedy against the trustee; and so if the matters rest in account between the heir and trustee, his purchase is safe, though the money be mispent by the trustee.

But *lis pendens*, between the heir and trustee to have an account, is sufficient notice in law without actual notice of the suit, so that if he purchase, it is at his peril. So that if in the event of that suit, it falls out that the debts were paid when he purchased, or sufficient of the personal estate to pay his debts without sale, the heir will recover against the purchaser; but if it fall out there was a necessity to sell them, then the purchaser is safe.

But such dependence of suit must be real, and not collusive.

Nota.—In this case the bill was filed the 18th of June, 1661, but no process served on Aston till November, 1661. And Sir Robert Aston's covenant was in July, 1661, mean between the bill and process served: but at common law, if an executor be sued, and after an original pay a debt of the same nature without notice of the original, he is excused. But it seems to me the cases differ, for an executor is a person known to whom the plaintiffs may give notice, but the purchaser is *individuum vagum*; any man may purchase, and the heir cannot know to whom to give notice.

The question that was here, was, whether the legacy of Ruperta, the 1000*l.* were liable on the land or no? And true it is, that originally it is not, and there was divers questions arose upon that.

First. Whether the will were revoked by the deed?

The opinion of the Chancellor was, that it was revoked by the conveyance; and that was not much opposed.

Secondly. It was objected, that the legacy of the 1000*l.* was given out of the king's debt, which failing, the legacy failed. And if so, it was agreed the legacy failed.

1. Purchaser of lands appointed to pay debts is safe, though there be sufficient to pay off the personal estate.

2. But otherwise if the [116] purchase be *lite pendente*, by the heir against the executors. *Lis pendens.* Notice in law

Legacy to be paid out of the king's debt, that debt fails.

But it was answered, that the gift of the legacy was absolute in the first clause, the raising it out of the debt, and the following clause, but a direction how to come by it the sooner; but then it was objected, that the will charges only the personal estate with the legacy; for as to the land, though the will at first charged the land with the legacy, yet the will being revoked, the personal estate stands charged with it only, and not the land.

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Heir ceased
out of the
personal es-
tate. Lega-
the, recom-
pense from
the heir, etc.

Resp. It is true, the land does not stand charged with the legacy originally, but there was enough of the personal estate to pay the legacy if it had been so employed; and therefore when that personal estate is employed for payment of debts in case of the heir and lands, so much of the real estate as is ceased by the personal estate, shall be liable to the legacy.

The Lord Chancellor decreed accordingly, and a master to take the account.

Anaud contra Haniwood. 1682.

Marriage.
Custom of
London.

Benjamin Haniwood, citizen, &c. of London, had issue the plaintiff's wife, Sarah, and the defendant, his son, and by articles covenanted to advance and secure to his son 4000*l.* to be laid out in lands, which were to be settled on his said son for 99 years, if he lived so long, the remainder to his wife, whom he was to marry, for her life; the remainder to his first, second, &c. and other sons in tail, the remainder to the heirs of his son, and gave 800*l.* to his daughter in marriage, and after made a will in writing, subscribed by him, wherein he declared his daughter not fully advanced; and by another latter will declared that she was fully advanced, and the former will being revoked, died; but the 4000*l.* was paid, and the land bought and settled. He left other personal estate of 2600*l.*

The daughter sued in chancery, and the questions were two:

First. If the daughter were full advanced according to the custom or no? viz. if the declaration of the father by will subscribed, and after revoked, were sufficient to declare her not fully advanced; for such declaration by will is of no effect, because the will was become void; for determining of which, it was written to the city to certify. And 26 April, 1681, it was certified from the city, that it was a sufficient declaration, and so she was admitted to come in for a child's part, bringing in the 800*l.* in hotch-pot.

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The cause proceeding to a hearing, a second question did arise, viz. if the son should share in the 2000*l.* without that he brought in the 4000*l.* in hotch-pot; for trial whereof it was likewise referred to the court of aldermen, who made a

special report, viz. that the case appeared to them to be, that the testator, in his life-time, by articles of agreement entered into before the defendant's marriage, covenanted with the defendant's wife's father, to advance and secure 4000*l.* in the hands of Colvill, or such others as should be agreed on, at interest, in the defendant's name, until lands could be purchased therewith to be settled.

To the use of the defendant for life, and afterwards to his wife for her jointure, and then to their several children successively, and afterwards to the right heirs of the defendant.

And until such purchase made, the interest of the money was to be to the defendant for his life, then to his wife for life, and afterwards to those to whom the remainder should have come in case the purchase had been made.

That the money was payed and laid out in lands, in pursuance of, and according to the said articles, before the defendant's father's death; and the question being thereupon, whether according to the custom of the city the 4000*l.* so paid and laid out pursuant to the said articles, be an advancement to exclude the defendant from any share of the orphanage part of his father's personal estate, without bringing the 4000*l.* into hotch-pot? and they certify,

That a portion in money given by a freeman of London to his son, has ever been taken for and towards the advancement of such son out of his father's personal estate, within the custom of the city. Also, that lands of inheritance settled by the father on his son, are no advancement of the son within the custom to bar him of the customary part of a personal estate.

But whether the 4000*l.* advanced and paid by the testator, upon his son's marriage, pursuant to the articles for purchasing of lands to be settled upon his son and his wife, and to the other uses therein mentioned, be, by the custom of the city, an advancement of the son, to bar him of such his customary part, they cannot determine, for that they have not known, nor can find in any of the records of the city any precedent of the like case; and therefore they submit the same to the court, and now the cause is at hearing on that certificate. When the plaintiff's counsel had begun to argue that this money coming only out of the personal estate of the father, and the father thereby lessened his personal estate, which else would have fallen to his children, and therefore no way like the case where the father parts with his lands to his son, and would have proceeded to other reasons that the custom of the city is the law of the place, and not tied to such strictness as private customs of wills, or places are.

The Lord Chancellor interposed, and said that it was a clear case, and he had known so in his time, several times,

and that in this very case: the mayor and aldermen were of that opinion; and making some reflections, as that the certificate had not been fairly obtained, decreed against the plaintiff, that the defendant might share in the 2,000*l.* without bringing the 4000*l.* into hotch-pot.

Beckford contra Beckford. The same day.

Decreed, that where a citizen had several children, and some of them are advanced and some not, the advanced children die, the father dieth, there shall be no consideration had of the dead children who were advanced, but it is all one as if they never had been.

Doyly contra Smith. 16 July.

New bill after dismission on the same equity by a third person, because he could not have a bill of revivor.

A question was, whether a settlement made on the defendant's wife on payment of 2000*l.* were so made as that it was redeemable as a security or no by those in remainder, after an estate tail limited to the defendant's wife. John, in remainder in tail, exhibited a bill, being the next in remainder, to redeem and pay the money; after witnesses examined, and the cause heard, he was dismissed: but pending the suit he levied a fine, to the intent to enable himself to pay and redeem, and limited the use as before, which was to the use of the heirs male of his father Robert. To which he and the plaintiff his brother were inheritors; the dismission of John was pleaded in bar; the plea over-ruled, because he could not have a bill of review, though the former bill of John was grounded on the same equity, 16 July, 1682; but it was said that the former dismission was on other matters.

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Nott contra Hill. July 20, 1682.

Bargain of excessive value gained in time of necessity, set aside.

Sir Thomas Nott, father of the plaintiff, upon some occasion not very justifiable on his part, viz. because 1,000*l.* which was to be laid out in lands for his children, by Mrs. Thinn, his first wife, mother of the plaintiff; the plaintiff did not consent that his said father, then married to a second wife, should have that money; the father allowed the plaintiff no maintenance at all, but he was put to extremity of misery and want; and having an estate tail in a building at Richmond, called the Queen's Stables, of 30 or 40*l.* per ann. value, a remainder after his father's death with remainder to others. Hill, father of the defendant, an attorney at law, did, in the time of the plaintiff's necessity, furnish him with 30*l.* and agreed to pay him 20*l.* per annum during the joint lives of him and his father; which annuity was paid for five years; he conveyed to Hill the said buildings in fee, and the bill now is to be relieved, and have a reconveyance, as

being a conveyance gotten at a great undervalue and gained by extremity, working on the plaintiff's necessity, and such conveyances and bargains gotten from young men in their father's life time, have been often relieved when they have been gained by occasion of the weakness, viz. prodigality or necessity of young heirs in their father's time; and there is no difference whether such bargains be for lands or money.

E contra. The defendant's counsel objected, that here is no art used to draw the plaintiff into the bargain; he hath no money lent, but the bargain was of his own seeking, and was hazardous; for if the plaintiff had died, being tenant in tail, the money had been lost; and if the father had lived it might have proved a hard bargain, the houses are ruinous, and of but small value.

Lord Chancellor. Put the case, Hill had given him 30*l.* [121] to have five times so much on the father's death, should not the court relieve in such a case? Here you have five times the value in land; and decreed for the plaintiff. He said, by the civil law a bargain of double the value shall be avoided, and wished it were so in England.

A bargain of the double value by the civil law set aside.

Pollard contra Downes. 21 July, 1682.

Trustee *al auter use* made a letter of attorney to J. S. to manage and receive the rents and profits of the lands, who did so, and accounted to the trustee, and now being sued by the *cestuy que trust* insisted that the trustee, not he, was to account, and he having already accounted, he might be quiet as to the plaintiff; but the Chancellor decreed him to account to the plaintiff.

Double account by the servant of the trustee.

Note.—The trustee was dead, but that was not yielded as the reason.

Barebone contra Barnes. 22 July, 1682.

Barnes possessed and interested in the lands for sixty years, yielding 5*l.* per annum, and indebted and in danger of an arrest, by articles sealed assigned his estate to the plaintiff for 290*l.* and his tools and other utensils on the premises, then employed for making of brick. The articles are dated 16 March, and a proviso that if the money were not paid, &c. in five days, then to be void; the articles were not performed or money tendered, but there being no proviso in the articles for the discharge of the defendant, for the rent in future, there arose some discourse about it; they both went to Mr. Mosier, a counsellor, about it, and he propounded that Barebone should endeavour to purchase the inheritance, or else procure a sufficient person to take the assignment from Barnes and secure him, or to that effect; and to that end the matter to

Fine no bar
of trust if no-
tice.

First, it was answered, that the non-claim or fines could not hurt the plaintiff's title, because the fines were levied to parties privy to the trust, so as what estate soever passed to them the trust was not disturbed, for they who purchased with notice and privy are still liable to the trust.

Sir John Churchill insisted *e contra*. That if a trustee for valuable consideration alien by fine with proclamation to one who hath notice, the alienee shall be subject to the trust, but the *cestuy que trust* must within the five years sue and make claim, or else he shall be barred, for the alienation was a breach of trust and cause of suit.

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Lord Chancellor *e contra*. There were then no safety of any trust, if a trustee or mortgagee should levy a fine to one who hath notice, if that should bar by non-claim? He therefore decreed, that notwithstanding those fines and non-claim, the plaintiff's title was untouched by them. He farther declared, that a title in equity or a trust, is, and should be barred by non-claim and fine; but that must be where the person to whom the fine is levied, hath no notice; and in such case the claim must be a proper way; if it be of a trust or title in equity, it cannot be by entry, but subpœna; and if he have title by writ at the common law, and his entry not lawful, an entry is not good to save the right.

Reviver of
trust.

2dly. Admitting the fine and non-claim did bar the plaintiff's claim of the trust: yet when he that broke the trust, comes afterwards to be owner of the land, though on good and valuable consideration, the trust as to him revives again, and he shall be liable to make satisfaction, and restore the land to the trust, and it shall not lie in his power to defend himself, by breach of trust, and this is so at common law for lands. A disseisor aliens; the alienee dieth seised: now the entry of the disseisee is barred; but if the land come again to the disseisor, the entry of the disseisee is revived. So for goods, if a trespasser of goods sell them in market overt, the owner's title is barred, but he may seise them if they come to the trespasser again: so in a case of equity, Norton against the Earl of Cunsale.

Churchill. William Bony was but one of the four that broke the trust.

Release.

Lord Chancellor decreed for the plaintiff.

3dly. As to the release and arbitrament, it appeared though the release was of all actions and demands; yet it appeared that the arbitrament, submission and the release, was made on differences only, concerning other matters, viz. the shares of the parties of the personal estate of another dead kinsman, and was for them and their executors to the parties and their executors, and not heirs.

4thly. The plaintiff had given a distinct release before the purchase made, of all actions real and personal; yet there was no occasion proved why that release should be made, nor any alleged, and there were other dealings between them: therefore presumed not to relate to this matter, and so the decree passed for the plaintiff.

Afterwards the Lord Chancellor declared at another day, that he had conferred with the Chief Justice of the king's Bench, who was of the same opinion.

Davies contra Moreton. Nov. 1682.

Moreton possessed of a lease for years, for 2000*l.* assign- Forfeitures. ed to the plaintiff, Davies, on condition not to alien without license. Davies, without license, mortgaged the lease. Davies becomes a bankrupt. The commissioners assign to the plaintiff, who exhibits his bill to be relieved against the forfeiture, and to redeem, if so be that the mortgage were before the act of bankruptcy; for the mortgage was pretended to be but five weeks before the commission. Moreton waves the advantage of the forfeiture, if he may be paid the 200*l.* which was the consideration of the assignment he made; but he had on the assignment taken bond of Davies for it; and that was a security, and determined the contract for the 200*l.* so he had chosen his security, and might not thereby charge the lease, or the assignee thereof, if he had taken an assignment. And farther, he did actually come in as a creditor for the 200*l.* before the commissioners, and paid contribution.

But the Lord Chancellor would not relieve against the forfeiture without payment of the 200*l.*

Quære. If he would at all relieve against the forfeiture, unless Moreton had offered it in his answer, so as he might be paid the 200*l.*

Husbands contra Husbands. Eodem die..

A. seised in fee, made his will in writing, and charged his lands and personal estate with 400*l.* to finish a building which he had begun, and was unfinished when he died: the will as to the personal estate was good, but not good as to the land. Lands charg-
ed by will to
finish build-
ing not good.

Hobs contra Norton, &c.

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The Case.

The father of two of the defendants, granted to the young- Purchaser
er brother and his heirs, an annuity, charged on the land in not relieved
question, with power of revocation, and died. The younger against the
brother treated with Hobs to sell to him the annuity. Hobs, who encour-
title of A.

aged him to before his purchase, inquired of the elder brother whether there was any revocation made; he told him none; that he had still paid the rent, and knew nothing to the contrary but that he must pay it, and much to that effect, and continued payment. Hobs, for valuable and full consideration, purchased the annuity of the younger brother. The elder brother, after some time of payment to Hobs, refuseth payment of the annuity. Hobs exhibited a bill to be relieved, as in Amy's case, where a mortgagee or cognizee of a statute was inquired of by him who was in treaty to purchase the land, whether the land was free of incumbrances, and was told by him that there was none, and that he might safely purchase. Whereupon he purchases, and was relieved against the mortgagee.

The heir's defence was, that he did acknowledge the inquiry, and his answer thereon, but then knew nothing to the contrary; but yet that ought not to prejudice him, for that since then he had discovered a settlement made by the grandfather, on marriage of the father, grantor of the annuity. Whereby, in consideration of marriage, and a valuable consideration of money, the lands were entailed on the father, to which entail he was heir, and by consequence the grant of the annuity void as to him; and that this settlement was concealed from him till of late; that his payment and acknowledgement was while he was ignorant of his right, and innocently done, and ought not to oblige him. That Amy's case differs from his; for there was a fraud to draw on a purchaser, in encouraging the purchaser against his own act and knowledge; it was fraud if not malice, to do so.

There was another point arose on the debate, but as to this the Lord Chancellor delivered no opinion.

Anand & Ux. contra Honiwood.

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London orphanage part.

A citizen and freeman of London having two children, married one of them and gave her a portion, and after made a will in writing, and gave her a farther sum: declaring therein that his estate should be divided, according to the laudable custom in thirds, &c. which will was subscribed by him: afterwards he made two other wills in writing, wherein, (being also by him subscribed,) he declared that he had fully advanced the said daughter; and in the last did, upon that reason, give her 500*l*. she marrying the plaintiff, they sue in chancery for a child's part, bringing into hotch-pot what she had received, and that the other child might bring into hotch-pot what he received; the suit was against the executor, &c. and decreed accordingly upon the certificate of the recorder, *ore tenus*, made the 10th of May, anno 1681, who

certified that by the custom of London, that a declaration made by a citizen and freeman, &c. with his hand or mark subscribed thereto, though such writing were made for the last will and testament, and the same afterwards by him revoked, is such a declaration as will let in such a child of such freeman, to a child's part.

And it was farther decreed, that the defendant be examined before a master on interrogatories; to one whereof he demurred, and set forth that he and the² testator were joint partners in the trade of a woollen-draper, and each brought in 1000*l.* into the stock; so they were joint tenants, and he was survivor, and claimed the whole stock, and the debts belonging to the stock by right of survivorship; but the benefit of survivorship was denied, being in trade, though not merchant-adventurer.

Surviving
tradesman.

Jones contra Waller. Nov. 1682.

An administrator possessed of a term charged with a trust, assigns it in trust for himself. The administration on a suit by citation (not appeal,) is revoked, and now granted to the plaintiff. At his suit the assignment decreed to be set aside.

Assignment
of a term by
the administrator
to his own use, set
aside by subsequent
administrator.

Anonymus. The same day.

The plaintiff entered into a penal bond of bottomry to pay 40*s.* per month for 50*l.* The ship was to go from Holland to the Spanish Islands, and so to return for England. If she perished the plaintiff lost his 50*l.* She went accordingly to the Spanish Islands, took in Moors at Africk; and upon that occasion went to Barbadoes, and then perished at sea. The plaintiff being sued on the bond for the penalty, sought relief in chancery, pretending that the deviation was on necessity.

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Deviation,
nauticum fo-
cus.

The bill was dismissed saving as to the penalty.

Uvedale contra Ettrick. 6 Dec. 1682.

Mr. Uvedale, the plaintiff's husband, being seised of the manors of Loverley and Monuton, and of the farm of Martin, worth 600*l.* per annum, and of the manor of Horton worth 500*l.* per annum, and indebted 10,000*l.* made his will, and thereby devised the premises to be sold, and devised 1500*l.* to one child, and 1000*l.* to two others; and after his debts and legacies paid, the surplus of the land to be conveyed to his heir. The devisees which were to sell, were the wife, who is the plaintiff, Ettrick, Reeves, Hurst and Constantine. The testator died, having after his marriage with the plaintiff, mortgaged Horton, so as the plaintiff was dowable of all the estate. The defendants to the bill were the four trus-

tees, and the heir which was to have a sale made, but principally that Ettrick might be put out of the trust. The wife, one of the trustees, was drawn into agreement to release her dower in the 600*l.* a year, and to give a bond of 4000*l.* that if any of the children died, she should not take administration, except they all died; after which Ettrick turns to be the plaintiff's enemy, and divers matters are charged in the bill upon Ettrick, as if he practised to get Horton, and to be the whole manager himself. Reeves, in his answer, prays to be excused in the trust; Constantine and Hurst were not willing to join with Ettrick in the trust.

- [131] At the hearing the plaintiff declared, being present in the court, that though she had reason to be relieved against her release and bond, in regard by the agreement she was to have her dower set out of Horton, and the household goods in Horton-house; yet still she was contented to accept such dower in the third of Horton, which amounted but to 150*l.* per annum, and to join in the sale of the rest of the land, thereby to extinguish her dower therein, and to leave the goods in the house for the heir, so that Ettrick might be discharged in the trust: on the other side, Ettrick insisted to be continued in the trust, and would attend a master from time to time to get a purchaser, and to do all reasonable acts, &c.

A trustee removed out of the trust.

The plaintiff's counsel insisted, it being a joint-trust, and could not now be so executed, all refusing to join with Ettrick, therefore it belonged to the court to order it.

Lord Chancellor. I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it; and declared that without any reflection on Ettrick, he should meddle no farther in the trust, &c.

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DE TERM. SANCT. HILL.

Anno Regis 34 & 35 Car. II.

IN CANCELLARIA.

Tilsby contra Throckmorton. February, 1682.

Trustee charged on decay of the estate.

A trust to pay several portions to several children at their respective ages: the trustee pays one; the estate decays, so that there is not sufficient to pay the others; in that case the person trusted paid in his own wrong, for he shall make it good to the rest, abating proportionably out of each party's share, according to the loss; and he should have taken security in case of loss happening: and so also though the trust or legacy were to be paid to the eldest in the first place, or first, for that denotes not preference in the quantity.

And it was affirmed by Mr. Keck, and others at the bar, that many times it had been so decreed.

But the Lord Keeper North seemed of another opinion as to the last point: But agreed farther at the bar, that if the portion lay on, or out of Blackacre, or other particular fund, by itself, and the others out of a fund, each must bear his own loss.

Denny contra Filmer. 1682.

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A decree passed where the bill was never answered; but the bill taken *pro confesso*, though the party defendant never answered, but only appeared by his clerk, and the bill never read in court as it ought to have been: a bill of review was brought, and on demurrer dismissed: now the heir brought another bill of review; and though there was manifest error, not only in the form of the court, but in the right, viz. two heirs having title as heirs, one of them plaintiff had a decree for the whole, who had title but to a moiety.

Yet my Lord North dismissed the bill, and said there was no remedy but in parliament, and cited Mordant or Morgan's case; where a bill was grounded on a deed, whereto two witnesses were examined; but the deed was not produced, and the witnesses not agreeing, the bill was dismissed, and a bill of review was brought and dismissed: and after the deed was found, and affidavit of it, &c. and then a bill of review exhibited, but dismissed *quia* of the former bill.

Which, said the Lord Keeper, was a hard case.

To which it was answered, that it differs from the present case; for there the cause was heard on the merits, but here is not so much as an answer.

Lord Keeper dismissed the bill.

Anonymus. February, 1682.

The bill was to discover and have use of a deed, which was to lead the use of a fine levied by the defendant's mother, and concealed and suppressed by her.

Voluntary conveyance no relief for deeds against heir.

The case.

The defendant's mother seised in fee, she and her husband levied a fine, which by deed was declared to be to the use of the husband and wife, with other uses, under which the plaintiff makes title, viz. by the husband's will, the fee being limited to the husband.

The complaint is, that the defendant suppresses the deed. The defendant is heir to her mother, and insists that the fine was gained unduly, and denieth the having the deed, which was voluntary without consideration: and because the conveyance by the fine, &c. was voluntary without consideration

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no money being paid, &c. the court would give no relief, but left the plaintiff wholly to law to help himself there as he could.

Coventry contra Hall. 24 Feb. 1682.

Heir to answer mean profits taken by him to purchase tho' the conveyance void in law.

Two decrees for land, yet a new bill for mean profits.

Sir Thomas Thinn had issue Sir James by one venter, Sir Henry Frederick, by another, and made a conveyance of several manors on Henry, which being designed by way of covenant to stand seised was defective, and afterward was decreed in chancery to be relieved, and likewise settled by act of parliament.

Afterwards 1650. Sir Henry Thinn exhibits a new bill against Sir James for the mean profits, which was decreed that Sir James should account for the mean profits from the year 1646, when Sir James got the possession. The suit divers times abated by death, so the decree was not completed. Sir James was dead and made Thomas, his brother, executor. Thomas died and made the defendant his executor; Sir Henry likewise died and made the defendant his executor.

The cause now came to be re-heard touching the mean profits between the executors, *ab integro*. Two points were debated.

1. Whether Sir James, or especially his executors, should be accountable for the mean profits, for he had a title at law, the conveyance being defective, and being under no obligation of trust or covenant of articles, as heir unto his father; and the defective conveyance itself is not mentioned to be in consideration of marriage, or valuable consideration, and therefore Sir James was not guilty: but *curia e contra*.

2. The second and main question was, whether a decree being first had for the land, and no decree for the mean profits, a new bill shall be exhibited for the profits, especially, because in the first bill Sir James was charged for taking the profits, and relief prayed on the whole matter, so that Sir Henry, if he had asked it, might have had relief for the mean profits; and it is not denied but that he might have had a decree, if he had prayed it.

My Lord North confirmed the former decree made by the late Lord Nottingham for the mean profits, and that the executor of Sir Thomas Thinn, executor of Sir James, should account for them so far as the estate of Sir James, &c.

Brown contra Williams. 28 February, 1682.

Purchaser of bankrupt without notice not bound to discover. Bankrupt.

The assignee of a bankrupt exhibits his bill against the defendant to discover goods of the bankrupt, that came to his hands after the bankruptcy. The defendant by way of plea sets forth, that he had no goods of the bankrupt's, or that ever were his, but what he bought for full and valuable considera-

tion, and *bona fide*; and that at the time of the sale and payment of his money, he had no notice either of the commission or of any act of bankruptcy committed by the bankrupt.

On long debate the plea was allowed by the Lord North, and to take what remedy they could before the commissioners, or at law.

Hutchins, counsel for the defendant, cited a former precedent, but was not produced.

Leak contra Morrice. The same day.

The bill is to have an agreement performed by the defendant, which was in effect, that the defendant should assign a term for years in his house, and plate, and certain vessels of beer for 200 guineas, whereof he paid one in hand as earnest of the bargain, and three days after 19 guineas more; and part of the bargain was, that it should be executed by writings by a certain time. Stat. 29 Car. 2.

The defendant pleaded the statute for prevention of frauds and perjuries, and that it was a parol agreement, and none of the goods delivered by the defendant, so there ought to be no relief in law or equity, but confessed the receipt of the 20 guineas, and offered to repay them. [136]

Keck pro def. at the bar enforced the plea, because it was to take away the defendant's trade, and alleged the money was only paid for the lease.

Lord Keeper. It is clear the defendant ought to repay the money; it is charged that the agreement was to be put in writing.

It was answered, yea.

Whereupon the Lord Keeper over-ruled the plea.

Anonymus. The same day.

Assignee of the commissioners of bankrupt. Portman exhibited his bill against the defendant to discover lands, &c. which were the bankrupt's at the time of his breaking.

Hutchins, for the defendant, pleaded that he was purchaser for full and valuable consideration, and at the time of his purchase, and had no notice of any act of bankruptcy, nor that Portman was a bankrupt, nor of any commission, and refused to make discovery.

Purchaser without notice of bankruptcy not chargeable in equity to discover.

And the plea was allowed by my Lord North, Lord Keeper.

Barny contra Beak. February, 1682.

The bill, that the plaintiff's father being aged and infirm, and allowing the plaintiff, a young gentleman, but small allowance, that he being in want, one Stysted got acquainted with him, and told him that he had found out a parcel of wines, Casual bargain for double value.

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which if he would buy, he should not be inforced to pay for them till after his father's death ; they went to Beak, the defendant, who sold him several hogsheads of wines to the value of 1280*l.* and affirmed them to be of that value, and sound, good and merchantable ; and took of the plaintiff a statute of 2880*l.* 17 November, 1678, defeazanced to pay 1440*l.* within twenty days after the death of his father. The wines were flat and dead, and were delivered to Stysted, who could sell them for no more than 360*l.* that the plaintiff's father was but tenant for life, the remainder to the plaintiff ; that this was done by contrivance between the defendant Beak and Stysted by their fraud, and Stysted had 20*l.* of the plaintiff, and other gratification of Beak, and the plaintiff's father being dead the defendant Beak proceeded on the statute.

Trin. 1686.
this decree
reversed by
the Lord Jef-
freys ex rela-
tione Servien.
Hutchins.

The defendant Beak by answer, that he knew not Stysted, but he and the plaintiff came to him to buy of him wines, and he sold the plaintiff twenty tuns of claret at 36*l.* the tun, in all 740*l.* and after much treaty agreed, that if the plaintiff died before his father then nothing to be paid ; but if he survived his father, to pay double the value, viz. 1480*l.* ; that the wines were good and sound, and the plaintiff sent Ady, a known cooper, to taste and try the wines, who did so ; and the plaintiff, to encourage the defendant to sell, did inform the defendant that his father was sickly and kept his chamber, and denied the fraud, and that he sold the wines which were left, at the same price.

At a former hearing, 9 February, 1680, the Lord Chancellor relieved the plaintiff.

But now the bill dismissed saving as to the penalty of the statute, for there was no proof of any fraud, but it was a hazardous bargain.

Lord North. It may be Stysted put in other wines, or took out of these and filled 'em again with bad.

1 Pro Quer,
per the lord
North,
2 pro def. per
the Lord
3 North.
And then re-
versed by the
lord Chancel-
lor Jeffries.
Trin. 1686.

Nota. That the same day, viz. 9 Feb. 1680, when the Lord Chancellor relieved Barny ; he did not in another case relieve though very like it, viz. between the now plaintiff Barny and Pit. Pit lent Barny 1000*l.* to have 2500*l.* if Barny survived his father, and to lose the 1000*l.* if Barny died in his father's life time, secured by judgment ; Pit sued ; Barny sought to be relieved in equity and was dismissed.

Amand contra Bradburne.

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Trustees al-
lowed several
losses.

Trustee sued concerning the trust in chancery, obtained a dismission, and had costs paid him as in course, but the costs allowed him and taxed were short of his real costs. After a bill by the *cestuy que trust* to have account of the trust, on account of his disbursements he shall be allowed his true and

necessary costs in the former suit, and not be concluded, &c. and so ordered.

DE TERMINO PASCHÆ

Anno Regis 35 Car. II.

IN CANCELLARIA.

Lord Craven contra Widdows. 27 April, 1682.

Two partners in trade put in each an equal stock, and Partners agreed by covenant that the stock should pay the debts of the stock, and neither of their separate debts should charge the stock, but only his own estate, or to that effect; they both became bankrupts, and a commission against them both, one of them owed separately more than the other. Partners both bankrupts.

The question was between separate creditors of each bankrupt, and the creditors on account of the joint stock, for these would exclude the separate creditors to charge the joint stock, but that it should satisfy the stock debts. Creditors of the joint-stock, and separate creditors equal.

But the opinion of the Lord North *e contra*. For the covenant of the partners cannot bind any of their creditors, but only themselves.

Quære. How the separate creditors could have other title than those under whom they claim. Process.

Dicitur, that if one defendant cannot be found to serve process on him, if process be against him till sequestration, and he shall not appear, you proceed against the rest, as when one is outlawed at common law.

Brown contra Brown. 30 April, 1683.

The plaintiff was tenant for life, the remainder in tail to his first, second, &c. sons, the remainder to the defendant in tail. The plaintiff having no son, committed waste; the defendant brought his action for the waste, and at the *nisi prius* by the consent of the parties and rule of court the matter was referred to two of the jury to make their award by Michaelmas; on defect of an award then to Ballard, an umpire; no arbitrament being made, the umpire made his award and awarded 348*l.* damages; the plaintiff exhibited his bill to be relieved against the award, and for equity alleged: [140] Arbitrament.

First, excessiveness in the damages.

Secondly, the misdemeanor in the umpire, that he had declared before the umpirage made, that he would not meddle in the matter, and after umpirage made, declared that he made his umpirage for fear he should be arrested, whence his counsel inferred that he had been menaced.

Lastly, that after the submission the plaintiff had repaired the premises, and proved repairs made, and that 40s. would perfect the repairs, and therefore prayed a new trial.

The defendant insisted that the umpirage ought not to be set aside without fraud or partiality proved, that his saying he would not meddle in the business was in August before the time he was to make his umpirage, as the truth was; and the defendant had notice given him by the umpire to attend, which he did not, so that the umpire had no notice of the reparations, and if he had, it was not material to avoid the award.

The Lord Keeper dismissed the bill.

Baily contra Cotton. 13 May, 1683.

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Bemble seised in fee conveyed the lands to the defendant for 1,000 years, in trust, that whereas divers suits and controversies were touching the lands; that the defendant should defend the suits (*nota*, he was tenant of the land then and before to the plaintiff) and title with the profits and yearly accounts to Bemble of all the profits, and pay to him, his executors and administrators the surplus of what he should not expend, and should pay an annual sum after his death to the plaintiff, and another annual sum to another, and died; the plaintiff was his cousin and heir and sued for account and for the lands, in regard that a trust resulted to the heir after the expressed trusts were performed.

The Lord Keeper dismissed the bill.

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DE TERM. SANCT. TRIN.

Anno Regis 35 Car. II.

IN CANCELLARIA.

Foot contra Salway & al. 6 June, 1683.

Freight.
Merchant.

Foot let to freight to the defendants, being of the Turkey company, 200 ton of a ship, wherein he was interested, for a voyage to the streights, the price of the freight per ton was not expressed in the charter party. The ship brought home no silk or other commodities, used to be brought from Turkey; the freight whereof of some in such voyages was 5*l.* per ton, and of some 6*l.* per ton, usually and constantly paid, but brought home only box-wood, the freight whereof usually was only 40*s.* per ton; the defendants would pay but 40*s.* per ton; the plaintiffs bill is to have 5*l.* because though it be not so expressed in the charter party; yet it was expressly agreed,

that the ship should be loaded with silks or other the goods that paid the greater freight and enforced their equity; for that box-wood never in such voyages was brought home alone, but only to fill up empty places, but cottons or other goods, and no man will ever let out his ship, nor take ship to freight for box-wood only, for the freight at 40s. per ton will not pay the charge to the owner of the ship; and although the defendants pretend that they could not freight the ship with other goods, because the locusts in that year had eaten and spoiled the cottons in those parts, yet that might not excuse them from their agreement, which the plaintiff's counsel very earnestly pressed to have read and proved, especially Mr. Solicitor Finch, who finding the court against relieving the plaintiff upon the parol agreement said, that most part of the causes in court were of that nature; yet the court would not agree with him: but you may take remedy at law upon your parol agreement.

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Solicitor. No, my lord, because the deed is the agreement in law.

Lord Keeper. Why, when it stands with and not contradicts the deed, you may sue at law; and on conclusion did not relieve the plaintiff.

Alderman Backwell's case. Post.

Commission at the complaint of fifteen creditors on the statute of bankrupts, issued out against Alderman Backwell, who died shortly after; these creditors having judgment, and finding that on their judgment they might have better remedy than their proportion was likely to be on the commissions, the heir of the bankrupt paid their debts, and none other creditors appearing then to prosecute; by their consent the commission was suspended, and after thirty other creditors sued for a discharge of the *supersedeas*.

Bankrupt.
Supersedeas.
Commission.

First. Because when a commission is granted, not only the first prosecutors are interested therein, but all that will come in within four months; and therefore they having tendered contribution within the four months the commission ought not to have been superseded by consent of the fifteen.

Secondly. They alleged that the commission had been dealt in by the commissioners, and an assignment of lands made, and the alderman being dead, they should be remediless, for no new commission can be now granted, therefore prayed a discharge of the *supersedeas*.

On the other side it was objected that the assignment was void, being made after Backwell's death.

The Lord Keeper North. If I erred in granting the su-

persuadeas I can discharge it. 2dly. But if some creditors obtain a commission and receive satisfaction, I can at their request supersede the commission, if none other creditors appear. I am not bound to call them in, else it were mischievous, therefore ordered the commission to be brought in and the assignment, if the assignment be well, I can, &c. Try that at law.

Davis contra Weld. 22 June, 1683.

Necessity.
Conveyance.

Marriage settlement on the plaintiff and wife for life, the remainder to trustees for the life of Davis in trust to preserve contingent remainders to the 1st, 2d, &c. sons, &c. in tail. They were married eleven years, had no children, and Davis had not the portion of 1000*l.* paid, and was in debt 4000*l.* by that and other occasions; the estate settled was alleged to be 600*l.* per annum, and the bill was against the remainder man for life to join in sale of some part which also could not be done, and also the father and mother eaten out with the debts, driven to great want, and precedents cited where it had been done.

Lord North. I cannot justify to decree a breach of trust; if it had been done, it was it may be when recompense was made: and at last ordered precedents to be looked into.

Prideux contra Gibben. 23 June, 1683.

Devisor not
seised.

Amery, on treaty of purchase for lands with Pollard, articles were made and Pollard to convey to Amery lands called Rawson, in fee; Amery makes his will in writing, and deviseth in general words, all his lands to be sold for payment of his debts and legacies. After Rawson is conveyed to him, and he after levies a fine, and the Lord Chancellor pronounced a decree that the lands were well sold, though the devise general and the devisor not seised at the time of the will made, nor no new publication of the will being for payment of debts; and said, that if a man devise all his lands for payment of debts, and after purchase lands, that he would decree a sale, although there be no precedent articles.

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John Robinson and Fawknor, Plaintiffs, in a bill of review, against Nathaniel Noel, and other children of Martin Noel, deceased, on the first bill exhibited by the said children.

The Case was.

Barbadoes.
2 Vent. 358.

That Martin Noel being seised in fee of the moiety of a plantation in Barbadoes, by his will in writing devised the same to Robinson and Theodore Noel, who died an infant, and made Robinson and Theodore and James Noel, two of his sons, executors, and appointed Robinson to manage the

plantation, and died; the executors proved the will; the bill chargeth that Robinson was to supply the said plantation during the plaintiff's minority, and to answer the profits to them, it being for their maintenance, and chargeth that by the will the plantation was devised to the plaintiffs, and the said Theodore, since dead; and the bill prayeth an account against Robinson, although he had assigned to Fawknor, and leased to one Warsam for years at a certain rent, and yet had assented to the legacy; for he made a lease of the said half of the plantation, reserving the rent to himself in trust for the plaintiffs, and they pray an assignment of the term and account, Theodore and James being dead, and the plaintiffs their administrators.

The defendant, Robinson, confessed the seisin of Martin Quere, if in Noel, the father, and that by his will he devised the same to ^{fee.} him and to Theodore and to James, but denieth himself chargeable to the plaintiffs.

1st. Because by the law and custom of Barbadoes, plantations, though in fee, are not to go to the heir nor legatee till debts paid, and that the testator was indebted to others and to himself in great sums *ultra* the value of the plantation, and mentions the sums, and that he not being apprised at the time of the lease of such law or custom of the Barbadoes, made such a lease and reservation of the rent, but that he made the lease as guardian and trustee for the plaintiffs, the children, and not as executor, and therefore it cannot be taken as a disposition as executor, or assent to a legacy.

The Lord Keeper decreed for the plaintiff.

DE TERM. SANCT. MICH.

Anno Regis 35 Car. II.

IN CANCELLARIA.

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Lord Ranelagh contra Hayes.

Hayes covenants to save the Lord Ranelagh harmless touching three parts of a farm assigned to Hayes by the Lord Ranelagh, & *sue quia damnify*. Decreed by the Lord North to save harmless, and a master to tax damages. But it was much opposed by Mr. Keck, because a covenant is not to perform anything in specie, and a master in chancery to tax damages instead of a jury, and the plaintiff hath remedy at law, and not here.

Covenants to save harmless decreed.

And *nota*, the breach assigned was, that the plaintiff was sued in the exchequer by the king for rent, but it was not

charged in the bill here, or proved that the rent was behind, but only that he was sued, &c. and objected that this would, for every petty breach, subject the defendant to commitment.

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Mortgage.

Howard Vid. contra Harris & Robert. 6 November, 1683.

The bill was against Harris and Robert to redeem two mortgages made to Harris by Henry Howard, late husband of the plaintiff, and brother of H. heir to Harry; the bill charges the mortgages made, and that there was some agreements for redemption, if not expressed in the deeds, yet was to be redeemed and charged that she was jointressed on articles made before marriage, executed after by reason Howard, the intended husband, was then an infant, but at full age made a jointure to the plaintiff, and offers to pay the money, so she may be admitted to redeem; Robert consents to her demand; Harris denies the articles, and sets forth that as to nine tenements he was a purchaser for valuable consideration 1600*l.* from Sir Robert Howard, and after two mortgages made to him, the last mortgage including the first, and redeemable on payment of 1,000*l.* the nine tenements in lease for three lives yet in being.

The case came now to be heard, and on the pleadings and proof was, viz.

Sir Robert Howard in 1651, by fine and deed produced and proved, conveyed the nine tenements in reversion after three lives yet in being, and whereon 7*l.* 10*s.* was reserved to Harris and his heirs. Anno 1665, she (Sir Robert was then dead) married Henry; 1671, Henry in consideration of the money mentioned in the deed to be paid, conveyed Lurkin and other lands (the nine tenements are no part of these lands) to the plaintiff for her life, for her jointure, (quære, if not for her jointure,) and after in June 1671, conveyed the nine tenements in reversion to him in fee, but not to be redeemed but by Henry and the heirs male of his body and by no other, which by his answer he saith was done so, because of the injury Sir Robert had done him; for now one Berry then husband to the plaintiff, had set on foot a fraudulent conveyance made by Sir Robert and his brothers, whereby Berry, pretended that Sir Robert was but tenant for life, and so the conveyance of the nine tenements was void, which induced Harris to consent, for thereby, viz. by this mortgage and his conveyance he still kept possession, and received the rents 7*l.* 10*s.*

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Afterwards having his money 564*l.* secured by this mortgage, Henry Howard had need of more money, and Harris supplied Henry Howard with 436*l.* more, which made the debt 1,000*l.* and took a mortgage anno 1672, of the same

lands (the nine tenements in reversion as aforesaid) and of divers other lands to him and his heirs redeemable only by Henry Howard, and the heirs male of his body; but in this conveyance (quære, if not in the former mortgage also) Henry Howard covenants to pay the interest duly every half year, and the 1,000*l.* in anno 1686; afterwards in 1673, Henry Howard conveys Hopsell and Aston, which are the nine tenements, and divers other lands to the plaintiff for life for jointure, the remainder to himself and the heirs male of his body, or to that effect, the remainder over, under which Robert, the other defendant, claims; but as before is said, the plaintiff till this conveyance had no title to the land in Hopsell, &c. the nine tenements.

For the plaintiff, Mr. Solicitor, Mr. Keck and others insisted that both conveyances being with power of redemption by Henry Howard and the heirs male of his body ought in equity to be not so restrained. A mortgage can by no art or clauses be so restrained, but the mortgagor and his assigns of the equity of redemption or his own heirs, though not of his body, may redeem, else it would lie in the power of a scrivener to make all mortgages absolute in effect, and to put a bar to the power and jurisdiction of this court to relieve in cases of mortgage by inserting such a clause.

Mortgage redeemable by mortgagor and heirs male.

Mr. Keck cited a precedent 1678, between Kellington and Green. The condition of a mortgage was to redeem during the life of the mortgagor. Decreed that the heir might redeem.

2dly. The covenant on Henry Howard his part to pay the money and interest makes it a mortgage on Harris's part, and he might sue for the money, and it cannot be a mortgage, but it must be a mutual mortgage equal to both.

On the other side it was said, that generally it is true, that no restraints could be put on a redemption where the business is only lending of money by the one, and securing the money lent by the other; and therefore if the case were only that Harris had lent, &c. and Howard had made a mortgage redeemable by him or his heirs male, &c. his heir general or assignee might redeem; for securing the money is the main of the business, but this is not the case as to the nine tenements; for it is alleged and proved Sir Robert Howard had long before the jointure, viz. 1651, absolutely and for a full consideration by fine and deed sold those lands to the defendant, viz. the reversion and rents 7*l.* 10*s.* and Harris in possession of the rents before and till the jointure made; and the consideration of the mortgage 1672, to him by Henry Howard was the precedent title from the father of Henry. If it had been so plainly said, that for that reason and because he would

only redeem, and so his heirs male, it would have been a good restraint, that he and his heirs male might have liberty to set on foot his pretence, but no other. If A. in breach of trust vested in him for J. S. should convey the lands to B. and B. being intituled under a breach of trust, conveyed to J. S. on condition, that he and the heirs of his body may redeem. B. died without issue, shall his collateral heirs redeem, and so as that J. S. should be forced to convey not only the interest he hath by the mortgage, but extinguish his ancient title? For so it is desired here, that Harris should convey to the plaintiff and so lose his former title, for which he paid so much, and hath no consideration for it; for his lending of money to Howard is no consideration to Harris to lose his purchase and his money which he paid for it.

Again, Harris did really purchase from Sir Robert, it is not alleged or proved how Henry Howard comes to be interested, or what title Henry Howard had; it is not said so much as in the bill that Henry Howard was seised of any estate in fee or otherwise, but *abrupte* that he made such jointure and mortgage, and prays the conveyance, paying the mortgage money.

The defendant sets forth a purchase from the father by fine for valuable consideration. Now if you will have a reconveyance and redeem, you must show why the conveyance to the defendant is not good by showing a former title to the title of Sir Robert the conizor of the fine, or invalidate his conveyance by some matter, and not only by replication aver your jointure; else if a man take a mortgage of his own lands and lend money, he shall lose his land for his own money, viz. for nothing.

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Interest on
interest.

The objection on the covenant can press no farther than as to the other lands, where the defendant's title is only the mortgage.

The portion the plaintiff brought is but 1,000*l.* both her jointures are near 1,000*l.* per annum.

The Lord North, Lord Keeper, decreed the redemption, but on payment of the money, and interest on interest; and took a difference where the covenant is to pay the interest and where not, for debt lieth on the covenant.

Lyford contra Coward. 6 November, 1683.

Surrender
decreed ac-
cording to
possession.

The bill was for a decree of certain copyhold lands, parcel of the manor of Buckeridge in the county of Berks, and his title is by a surrender made long since by Richard Lyford, father of the defendant Mary, to the use of his will, under which will he claims, because all the rolls are lost or detained by Blagrave, lord of the manor, and enforces that the sur-

render is to be presumed because that he had been in possession 40 years, and done suit and service to the court as a copyholder. Blagrave, the lord, denies having any rolls; the defendant Mary denies both the surrender and will, and that she was but three years old at her father's death, whose heir she is, and since a feme covert, and therefore no laches can be imputed to her, neither in law nor equity; and being an infant did not discover her title, but lately being heir to her grandfather, who made the will; and for trial of her title hath brought a plaint in the nature of a writ of ail, as heir to her grandfather, viz. daughter and heir to Richard, son and heir to Richard, who as is pretended, made the will and surrender. Writ of ail.

At the hearing the plaintiff made no proof of the surrender and admittance, but proved that he had served several times as a copyholder at the court, and produced a note under Sir Edward Powell's hand of a receipt of money for his admittance; but to what estate he was admitted, does not appear. It was also insisted on, that the plaintiff had paid several legacies given by the will; but this was but lightly insisted on at this hearing, (but mainly on the long possession) because there was assets enough to pay the legacies, and the legacies were personal, nothing at all relating to the lands.

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The defendant's counsel answered: the possession against an infant and feme covert, was no concluding evidence, especially against an heir to support a voluntary conveyance against an heir at law, who had but this land left her, being but 4*l.* per annum. Whereas the plaintiff had a great estate from the grandfather; and insisted that the bill was founded on matter merely triable at law, whether will or no will, surrender or no surrender. Possession no concluding evidence against an infant and feme covert.

But the Lord Keeper insisting much on the possession as ground to make a decree for the surrender:

The defendant's counsel replied, that by the statute of 32 II. VIII. a writ of ail is allowed to be brought upon a seisin within fifty years: and though in some cases the court has decreed settlements without trial; yet that was always where the bill was founded on some matter of equity properly and peculiarly, finally to judge, as where a trust is built upon a conveyance, or the like; and the last judgment is in this court, which here is not so: and if the plaintiff thought an inferior court not capable enough to try the point, if the defendant did consent to try it in an *ejectione firme*, or otherwise as the court should direct, which is all the equity the plaintiffs could have here. Limitation. Possession.

But the Lord Keeper, though much pressed to the contrary, decreed the surrender and left the defendant to try will or no will.

Ratcliff contra Graves. 7 November, 1683.

An executor
lends and re-
ceives inter-
est.

An executor liable to debts and legacies payable *in futuro*, and having money of the testator's in his hands, lends it at profit, and receives it and the profit, or interest thereof. The debate was, whether he shall answer the interest he received as assets: Lynch's case, and other cases, *ante*; and the case of Mr. Cartwright in this court, (where it was decreed, that the executors should not be charged, and affirmed in an appeal in parliament) were cited; and the reason given then, and now given, because the executor not being bound to lend, &c. if he do lend, it is at his peril; and if it be by that occasion lost, he shall answer the same out of his own estate: and therefore as he shall bear the loss, he shall have the gain.

The Lord Keeper remembered Cartwright's case, for he said he did not like that case, for saying also that when the executor lent it on security, he might secure himself for a small matter.

Finch, solicitor. My Lord, the security so taken may fail.

Keck. It hath been taken here as a rule that the executor shall not be charged.

Yet now the Lord Keeper decreed the executor should be charged.

Lease wait-
ing on the in-
heritance, if
assets, &c.
Assets.
Vid. Hardres
Rep. accord.
by Hale in
Sir G. Sand's
case.

Nota. Also that this term be declared, that where a lease for years is to wait on the inheritance; that it shall be assets as to debts as well where the interest of the lease is in the hands of a stranger, and not in the owner of the inheritance, as when it is in the *cestuy que trust*, of the inheritance, and the interest of the inheritance in a strange trustee.

Nota. Contrary to former resolutions.

Lord Ranelagh contra Thornhill. 17 November, 1683.

[153]
Interest.

Bill of review to reverse a decree for money on account by the master, whose report was decreed: the error alleged was, that the master had allowed interest upon interest, for having made a total of divers sums paid by Thornhill, and interest for them. The master then added other sums after paid, and then cast up the former total, which was compounded of interest and principal, and in the latter allows interest for the first total, &c. and the Lord Ranelagh being summoned to attend, refused or neglected, and moved to be heard; but because not proper to be moved after a decree, not allowed by motion, but now directed to be examined and rectified as to that point, but the rest of the decree to stand.

Harding, and others, contra Marsh, Langley, and others.
19 November, 1683.

On commission against Peacock, a bankrupt, sued out by the plaintiffs: a distribution was made of 370*l.* to the plaintiffs; after the plaintiffs in two suits at law, prosecuted by them, were non-suited in one, and a verdict against them. Which suits were to have recovered 600*l.* part of the bankrupt's estate, and then they exhibited a bill in chancery, and there were dismissed, because, bankrupt or not, was only triable at law; then they sued at law, and had judgment, and also execution for 600*l.* Then Langley a creditor prays to be admitted in, and tenders charges of the commission, and that he may be admitted to partake in so much of the 600*l.* and other estate, *ultra* and beyond what was already distributed. The commissioners admit him, and call the plaintiffs to account; which they refusing to do, the commissioners sue the plaintiffs on a covenant which the plaintiffs had given to the commissioners, as is usual.

Bankrupt after distribution, and four months, other creditors may come in, but must not disturb the former distribution.

The plaintiffs now sued to be relieved against the covenant on two reasons:

First, that after the four months elapsed and distribution, no creditor can come in.

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Secondly, they had spent in the suits 900*l.*

The cause was now heard: the defendant's counsel argues, that it was true that Langley could not come in to disturb the first distribution, but might come in for the residue of which no distribution was made; for in that the first creditors had no more interest than the defendant, and there are no negative words in 21 Jac. which makes the restraint: but as to what is distributed by the precedent law, 13 Eliz. all creditors, whether they sue out the commission or no, might at any time come into the commission; for by that statute, each creditor is to have his proportion, *pro rata*, out of the bankrupt's estate, which made the execution of the statute in point of distribution, uneasy and difficult, because it was hard to find out all the creditors: and on the other hand, it was too great a power in the commissioners by that law; because the commissioners might have power the next day after the commission, or as soon as they pleased, to sell and dispose of the whole estate: to obviate which, 21 Jac. gives remedy and the words in that statute, (before distribution) must not be understood of the estate that is not distributed.

As I was about to argue that point farther, (it having been alleged at the bar that Langley's demand was vain) for nothing could come to him if he contributed to the charge the plaintiffs had been at; for the estate to come in, viz. the re-

sidue, would not be beneficial to him, 600*l.* only is recovered, out of which 300*l.* and 170*l.* being deducted, 130*l.* remained; and if their charges in recovery were allowed, nothing would remain.

But Mr. Keck, of counsel with the plaintiffs, acknowledged the defendant was to come into the commission paying the charge.

The Lord Keeper referred the account of the charges to be specially reported by the master; for Langley insisted that he had borne 200*l.* in charge with the plaintiffs, and is to be but at charge of the commission, not of the suit; for the recovery is to their own use, viz. the 470*l.* not of unnecessary suits, where also they failed.

[155]
Devise.

Lampen contra Clowbery. 19 Nov. 1683.

William Clowbery by his will gave 2000*l.* to the defendant; item to the daughter of the said O. Clowbery when she shall attain her age of 21 years, or be married, which shall first happen, the sum of 500*l.* to be paid her, with interest. The testator died, the daughter legatee, died under age, unmarried. O. Clowbery, her father, her administrator, sued and had a decree for the 500*l.* and interest thereof, to be accounted from the death of the testator; and Lampen (against whom the decree was) being executor, &c. brings a bill of review.

Where on debate, the difference was allowed by the Lord Keeper, between a devise of 500*l.* to one to be paid at her age of twenty one, or married, there it is due, though she died before twenty-one; and where 500*l.* is devised, if, or when she comes to twenty-one.

The point being a mere point in law, was long debated.

Mr. Solicitor argued, that because interest is to be paid, therefore the principal must be due; and said that the words transposed are 500*l.* with interest, to be paid at twenty-one, had made it plain, and the interest must be intended for maintenance of the child in the interim.

E contra it was said, that this is contrary to the words, which cannot bear that sense without violence; and 500*l.* and the interest, are by the will to be paid at twenty-one, or marriage, not before twenty-one, &c. And he meant it, that the interest computed, viz. from his death, should he paid for her portion; and this is best suitable, and stands with the words and is rational; Mantira, &c. l. 6. c. 14. *In testamentis ratio tacita non debet considerari, sed verba solum spectari debent. Multa possunt movere mentem testatoris quæ nos latent. Ideo, per destinationem mentis durum est a verbis recedere.*

The Lord Keeper once pronounced a reversal of the de-

eree ; but being much pressed, that the intention of the testator would be clear in the proofs, he declared he would suspend the decree, and hear their proofs.

— contra *Langton*. 24 Nov. 1683.

[156]

Mary — lent 700*l*. and took a mortgage of land called *Mortgage*. Sison, for a thousand years, in the name of her brother, and afterwards did purchase the inheritance in the name of a third person, and the lease was assigned to her ; she died intestate, and her mother took administration : the question was touching the benefit of this lease ; the heirs to her (her sisters) claimed as heirs against the administratrix.

A difference was taken at the bar, viz. that if Mary had been first purchaser of the fee, and after purchased a lease, it should wait on the inheritance, and the administrator or executor should not have or keep it against the heir ; but here the lease was first in her.

Lord Keeper. There is no difference in reason, and therefore dismissed the plaintiff as to this point ; and that the heirs were to have the lease to attend the inheritance. *Lease. Heir. Executor.*

Wagstaff contra *Read*. 20 Nov. 1683.

Portman became bankrupt ; the commissioners assign his estate, whereof the plaintiff made title to some goods, and exhibits his bill against the defendant to discover the goods, and their value, and what and how much he paid for them, because as the plaintiff charges, they came to the defendant's possession after the bankrupt broke ; the defendant sets forth that what goods did ever come to his hands, he bought of Portman *bona fide*, for a full and valuable consideration, nor did not know, nor had any notice that at the time of buying until the now bill, he was a bankrupt, or of any account of his bankruptcy, and pleads this matter against any discovery. *Purchaser not hurt in chancery. Bankrupt.*

After long debate the Lord Keeper seemed to incline that the defendant being a purchaser without notice, should not be prejudiced by this court : but on the other hand, if the sale were at extreme under value, as for 5*s*. or the like, then such a general plea shall not stand ; for then the plaintiff should be disabled to disprove, and any man in the like case should be protected ; therefore let the defendant set forth what the goods were, or what he paid for them.

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But the defendant's counsel objected, that would destroy and prejudice the purchaser, though he paid the full value ; for if he discovers what he paid, the commissioners will assign the money, or if he discover the goods, the commissioners will assign them ; and so the court shall be instrumental to wound the purchaser. If the plaintiff can help himself at

Defendant to law by the aid of the statute, he may, and the court will not answer, but hinder him, but not aid him here : the difficulty to avoid this plaintiff not mischief, on either side, held long discourse, and at last ended, to take advantage that the defendant should answer what and how much he paid ; thereof at so as the plaintiff did consent to take no advantage of the discovery, but here in this court, and not at law : which the common law. plaintiff consented unto by his counsel, and was to subscribe his consent, with the register, and then the defendant was to answer.

Osborne contra Chapman.

The defendant as guardian to the plaintiff's wife, an infant, had managed her estate ; and on the treaty of the plaintiff for the marriage with the wife, desired account, which was given him : whereon he and his counsel advised three or four days, and then 800*l.* was found due to the wife, which the defendant by three several bonds secured to the plaintiff ; and the plaintiff gave a bond in 1400*l.* to the defendant to release all accounts to him, after the marriage which was had, and the defendant paid the 800*l.* according to the bonds ; but the plaintiff gave no release, but now sued to have an account, and relief against the bond : but the defendant insisted that his agreement to make release proved by the bond given by him, and by his acceptance of the money secured by three bonds ; after the marriage was had he now ought not to have account.

[158] Lord Keeper. He accepted of no money but of what was due to him ; and the account was made before marriage, when he had no title, and there is no release made, as there was in the like case by Basset, which bound Basset, and the plaintiff greatly favoured in the accounts, and the marriage was but one year since, and the plaintiff's pursuit is fresh ; therefore answer the bill.

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DE TÈRM. SANCT. HILL.

Anno Regis 35 & 36 Car. II.

IN CANCELLARIA.

Bonham contra Newcombe & Ux. 25 Jan. 1683.

The former decree, *ut supra fol.* pronounced to be reversed by the Lord Keeper North on precedents cited and long debated. But order to spend, &c. and he would hear the cause *ab origine*. He disliked also the entry of the decree, viz. reciting the bill and answer ; and reading the proofs, and

hearing counsel, decreed it a mortgage; and therefore not stating the point of fact, viz. that it appeared thus or thus, &c. And so he did lately in the case of the Countess of Anglesey.

Hobert contra Hobert. 26 January.

The suit was to avoid a conveyance by fine and deed to lead the uses of the fine twenty-three years since, on supposition of fraud, purchasing the fee of the land for 11*l.* worth 60*l.* per annum: the plaintiff, ignorant of the value, but the defendant well apprised thereof; and the plaintiff ignorant also of his title, which he came to the notice of after the fine. The bill was dismissed. Fraud.
Release.

The Lord Keeper declared that if one will seal a release [160] or other assurance, to one in possession, for never so unequal consideration, it shall not be relieved, because of a new title discovered, unless there be some special fraud; as if A. having title, and B. in possession, B. conveys the land to A. in trust for B. and then gets A. to convey the land to him as in execution of the trust, whereby A. extinguisheth his title, &c.

Holby contra Holby.

The defendant recovered dower against the plaintiff, an infant; one appeared for the plaintiff, then tenant, as her guardian, being her grandfather, but father to the defendant, then demandant in the writ of dower, and suffered judgment, for he could do no other; but the dower was unequally set out by the sheriff, but the sheriff not culpable of any fraud. But great inequality appearing; Dower.
Judgment.
Equality.

The Lord Keeper declared, that the plaintiff ought to be therein relieved.

Whereupon a proposition was made by the plaintiff's counsel, that either the plaintiff should set out the whole in three several parts, and the defendant choose one part for her third, or if the defendant would set them out, and they choose two.

Rich. contra Rich.

In debate, agreed by the counsel, and not denied by the court, that a lease for years waiting on the inheritance of a citizen, shall not be reckoned as a chattel, to be divided among children by the custom. London.
Orphans.

2dly. It was certified by the recorder, that if a citizen convey to a child inheritance, though it be expressed for advancement, it bars no child's part: but such child may come in for a share, &c. with the rest.

3dly. It was debated, whether if a citizen marry a daugh-

ter, and give money with her, and she desire to come in for a share, whether she shall be admitted if the father do not in writing declare her advanced ; and the sum, as in *Inds. Law temp. E. VI.* or whether she shall not come in ?

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Lord Keeper. I regard no by-law in the case.

Churchill. The precedents are many, that unless the father do declare her unadvanced, she shall come in. We ground not on any by-law, but the custom, which presumes in such case a full advancement, unless the contrary appear.

Anonymus. February, 1683.

Plea.
Notice.
Purchaser.

A bill was exhibited for discovery ; the defendant pleaded, that he was a purchaser for valuable consideration, viz. so much, &c. and that he had no notice of the plaintiff's title, &c.

Ruled by Lord North, that the plea as to not having notice by way of plea, was not good ; but it ought to have been as to the notice by way of answer, and not by way of plea, on debate ; but yet that the defendant being a purchaser, should not lose by the formality of pleading the benefit of his plea, if he should answer the whole plea ; for if he should answer to the time of his purchase, which possibly was *in fact*, after the plaintiff's purchase, (they were indeed both of them mortgagees,) then the plaintiff might wound him at law ; he should put in a new plea, and put in the point of notice by way of answer, or to that effect, was the order.

Broad contra Broad.

Decree.
Form of entering.
A decree.

A bill of review on the decree was brought to hearing the 22d of Feb. 1683, and the decree was read and objections made against it.

1st. That the decree was founded on a trust, arising on an agreement by the husband ; but the decree mentioned no such agreement, but recites it in recital of the plaintiff's bill, and then proceeds to recite the answer, and then proceeds to the decree on this manner. Whereupon and reading the proofs, the court decreed the trust and redemption, but doth not say that such agreement was proved. Therefore the plaintiff's counsel insisted, that the decree was made on the bill and answer.

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Mr. Solicitor and others said, that it was the course, and a hundred decrees were so ; and when it is said on reading the proofs, it is decreed, it is intended that the matters put in issue are proved.

But *e contra* it was said, that a decree ought to be grounded on fact, *ex facto jus oritur*, and else by the clerk's course the defendants should be barred of a review in all cases : for the plaintiff, in bill of review, cannot allege matter of fact.

contrary to what is stated in the decree to be proved ; and it may be many issues are joined in the bill and answer ; if this course should hold, all must be admitted, and no man can truly know on what fact or case the decree was made, nor any appeal brought.

The Lord North declared accordingly, and was clear of opinion, that it was not enough to say (on reading the proofs) it is decreed, but on reading the proofs, it appeared thus and thus, and therefore decreed, &c. And on this reason said, that he took no notice of the agreement ; but yet affirmed the decree, because when the wife joined in the fine, *sur concessit*, of her jointure, in order to a mortgage or security, it was not an absolute departing with her interest ; but there resulted a trust for her when the security or mortgage is paid, to have her estate again, as if it had been a mortgage on condition, and the money paid at the day.

DE TERM. SANC. TRIN.

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Anno Regis 36 Car. II.

IN CANCELLARIA.

Anonymus.

Sir John Churchill showed that a sequestration for non-appearance was issued against the Lord Mohun, an infant of seven years. Several ill and beggarly fellows, as sequestrators, by colour thereof, received the rents of the Lord Anglesey, and certified the demand of payment of others ; A. B. C. &c. tenants, who refused to pay their rents ; whereupon an injunction issued against A. B. C. &c. to pay their rents to the sequestrators, and some tenants were imprisoned, of which he complained, and said, the Lord Anglesey present in court, the tenants dwelt in Cornwall, and it were hard they should be forced to come to London. At last the Lord Anglesey offered to appear for them ; and if so, and the contempt in the tenants did not appear, cost to be awarded.

Sequestration against an infant lord for not appearing.

Sequestrators receive rent.

Nota.—The process of injunction was not against tenants of the Lord Mohun, but A. B. C. &c. by name.

Sir John Churchill said a messenger of the court should be sent to bring in the infant, and when he comes in, the court shall or may assign one of the six clerks as a guardian to appear and answer, &c.

[164]

Infant sent for into court.

Lord Keeper. How will that look in the lord's house, that an infant peer shall put the defence of all his estate in a six-clerk, who knows nothing, and cannot be informed by the infant of his estate, &c. At common law the parol was to

demur, and the infant is not bound to answer till full age. And execution of a judgment for debt against the ancestor cannot be against the infant heir: and by act of parliament the execution of a statute is not against an infant, for the register, parliament and common law give no execution against an infant heir, although the debt were clear and indisputable, viz. judgment, or by statute.

Yet *e contra* is done in chancery.

Hatton contra Gray. 14 June, 1684.

Agreement
by note tho'
signed but by
one, yet good.

Hatton sold houses to Gray for 2000*l*. Note was made by Hatton of the agreement, signed by Gray, but not by Hatton. Mr. Solicitor. The note binds not him who signed it not, for the statute of frauds and perjuries, &c. and therefore in equity cannot bind the other party, for both must be bound, or neither of them in equity.

But decreed contrary.

Anonymus. 1684.

Mortgagor
borrows
more money
by bond, the
heir shall not
redeem with-
out paying
it.

Mortgagor borrows more money of the mortgagee, and gives bond for it; the heir of the mortgagor shall not redeem without also paying the debt by bond, if that the mortgagor bound himself and his heirs in the bond.

East India Company contra Interlopers. 29 June, 1685.

[165]
Injunction to
stop merch't
ships.

The East India Company had a verdict against interlopers, who in breach of the charter traded; but the company not being otherwise able to discover the particulars of the commodities, &c. and damages, exhibited a bill of discovery; to which the defendants gave insufficient answers, and so reported by the master; and the plaintiffs' title being found good at law, and that their patents were good in law to exclude others from trading into those parts, they now prayed an injunction against the defendants, to stop certain ships which the defendants were setting forth to those parts, to trade in farther breach of the patents: and so the like was done formerly in case of the printers for importing bibles.

Vid. Ant. sta-
tioners case.
No injunction
to stop tra-
ding.

Lord Keeper. The case is of a great consequence; if it be to stop actions on insufficient answers, but to forbid plowing or trading, or the like, I cannot, but will advise.

Bond & Ux. Administratrix of Elizabeth, Daughter of Mary, the former Wife of Thomas Brown.

The Case.

Portion given John Brown, the great grandfather of Elizabeth, John to be paid at her grandfather, and Thomas her father; Thomas was seis-

ed of the lands, &c. in question ; and they all by fine and recovery settled the lands in question to the use of Thomas for life, the remainder to Mary for life for her jointure, remainder to Stulford and other defendants for 99 years, the remainder to the issue male of Thomas in tail, remainder to George Brown in tail, &c. the settlement was in consideration of marriage of Thomas with Mary, the plaintiff, and 2,000*l*. portion. George Brown, on whom the remainder was settled, was a remote kinsman, viz. son of George the son of John, father of Thomas. The marriage took effect, and the portion paid.

The term was by the same deed, which declared the uses, declared to be to raise out of the premises 2,000*l*. for the daughter and daughters of Thomas by Mary, and maintenances yearly not exceeding 20*l*. per annum, if one daughter 2,000*l*. and if any daughter died, the survivors or survivor, if more daughters than one, to have the part of daughters dying : viz. if Thomas die without issue male, or having such issue male by Mary, if such issue should die in minority or unmarried, the trustees should out of the premises raise and levy 2,000*l*. for the portion and portions of such daughter and daughters, together with a competent yearly maintenance for every such daughter and daughters, not exceeding 20*l*. per annum, and the 2,000*l*. to be paid at 21 years or marriage, which should first happen. Proviso, if the said Thomas Brown in his life-time, or any to whom the immediate remainder, &c. should appertain, should within 12 months next after the death of the said Thomas Brown, without issue male by the said Mary, either pay or secure the same, and the said maintenance to the liking of the said trustees, then the said term to cease. Thomas died, having a son, who died without issue ; Elizabeth his sister then living, and many years after, till she was 19 years old, and then died : Mary the mother took administration to Elizabeth, and the bill was to have the 2,000*l*. and the 20*l*. for so many years as Elizabeth lived, for George in remainder had entered and received the profits, but not paid the 20*l*. nor maintained Elizabeth.

The Lord Keeper decreed for the plaintiff as to the maintenance, notwithstanding that her grandfather John had by his will given the said Elizabeth 2,000*l*. so as she needed not maintenance ; but as to the 2,000*l*. dismissed the bill.

21, or marriage.
The daughter dieth, her administratrix sueth.

DE TERM. SANCT. MICH.

Anno Regis 36 Car. II.

IN CANCELLARIA.

*Whitmore contra Lord Craven & al. December, 1685.*Will.
Executor.

William Whitmore having issue only one son, made his will in writing, and thereby devises several legacies; and after wills in this manner, viz.

The surplusage of my personal estate; my debts, legacies, and funeral charges being paid and satisfied, I give unto the Right Honourable William Earl of Craven, for the use of my only son William Whitmore, and his heirs, lawfully descended from his body; and for the use of the issue male and issue female, descended from the body of my sisters Elizabeth Weld, deceased, Margaret Kymmish and Ann Robinson; in case that my only son William Whitmore should decease, in his minority without having issue lawfully descended from his body. I nominate and appoint my only son William Whitmore, executor of my last will and testament; I nominate and appoint the Right Honourable William Earl of Craven, during the minority of my only son William Whitmore, executor of my last will and testament. And commends and commits the education and tuition of his son to the care of the said Earl.

[168] In the year 1678, the testator died, his son being then about the age of 13 years. The Earl of Craven proved the will, and paid the legacies; and the residue of his personal estate consisted for the most part in cattle, house-hold goods, plate, jewels, arrears of rent, and debts upon bond; the mortgages being not considerable.

William Whitmore, the son, is lately dead without issue, being above the age of 18 years, and under the age of 19, and had never taken upon him the executorship to his father.

That William Whitmore, the son a little before his death, made his will in writing, and thereby devised to his wife all his estate, real and personal, and what else he could give her, and makes her executrix.

The widow sues for the estate and surplusage; the sister's children exhibit a cross bill for it: Dec. 1685, both were heard.

Term.
Remainder.
Devise.

The questions were two:

1st. Whether the devise of the surplus to the use of the children in case that William the son did take effect, is good in law? Because it is to them in case William die without heirs of his body during his minority; for the defendant pre-

tended that though a term or a chattel given to one, and the heirs of his body; and if he die without heirs of his body, yet when it is so given on a contingency to happen in a short time, and which is to happen at farthest on the death of one person, it is good that the intention of the will may be performed; and Maslingbord's case, and that of the Duke of Norfolk cited. But *e contra* it was said, that though that may be true in case of a chattel real, it cannot be in case of money, or personal chattels, which once vested, (as here in William the son) can never be divested, never any such precedent was, or can be; the inconvenience would be great, and in the case of term or chattel real, it was long ere it was allowed, and the use of money is the money itself.

2dly. For the plaintiff, that if it be a good devise, yet the contingency never happened; for William must die during his minority, or else the defendant can have nothing, and minority is not 21, but 17 in case of executorship; and minority in the first part of the will is of the same sense as the word minority is in the latter part; the same word in the same will is of the same sense; and the rather because the executorship of the Lord Craven being but during the minority of William, the executor ceaseth when William comes out of his minority as executor; William is first named executor, and then the Lord Craven is made executor during the minority of William; that is, while he comes to be of 17 years of age, and then the Lord Craven hath no more to do. William can sell, alien, (yea) and devise his own estate by will; the Lord Craven's interest of executorship ceaseth.

At what age
an infant shall
be an execu-
tor.

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The Lord Chancellor decreed accordingly, and put the case as if the clause of executorship had been in the first place, and Lord Craven named executor during the minority of William; and then if William die during his minority, the residue to the children, were without question, and the property at 17 vested in William, and cannot be divested; and said that if the case had been of small value, it had endured no debate, but now six counsel of each side have spoken.

DE TERM. SANCT. HILL.

[170]

Anno Regis 1 Jac. II.

IN CANCELLARIA.

Newdigate contra Johnson.

The plea of an account of an orphan's estate before the Account aldermen of London, was disallowed, and a surcharge al- London.

Interest.

lowed to be made thereon, by the Lord Chancellor; who said when he was recorder of London, he observed well the manner of their taking such accounts: he also decreed that the executor pay interest at 6*l.* per cent. for the money, he had not paid into the chamber till he paid it in, though the chamber usually takes but 5*l.* per cent.

Greswold contra Marsham. Eodem die.

[171]

There was due to Marsham 4,000*l.* upon a mortgage made to him of lands: the mortgagor after the mortgage, acknowledged three judgments to other persons for other moneys due; two of those persons to whom the judgments were given, gave notice to Mr. Marsham, of their judgments, and desired him to accept of his money that was due upon the mortgage, which they said they were ready to pay him, and desired him to appoint a time when, and they would pay him his money within a fortnight, to the intent that his mortgage being set aside they might take execution on their judgments, but proved not any money actually tendered; but afterwards Marsham exhibited a bill against the mortgagor, and had a decree to foreclose him of redemption; and afterwards took a farther absolute conveyance from the mortgagor, for a considerable sum of money; and now the two creditors had a decree against Marsham to pay them their money; but Powel, the third creditor, had no relief, because he gave no notice in time of his judgment.

Comyns contra Comyns. Eodem die.

The Case was,

Loss.
Legacies.
Contribution.

Several legatees by will, of sums of money in Numero, others in specie; the estate would not pay all; the question was, whether the loss should fall only on the legatees in Numero, or whether the specific legatees should contribute proportionably.

The Lord Chancellor was strongly of opinion they ought to contribute; for he said that the intention of the testator was as much that one should have all the money, as the other should have the whole specific legacy; and put the case, suppose three specific legacies be one horse, &c. and there is not sufficient to discharge them all by reason of debts, what shall be done there?

E contra. It was objected that the practice of the civil law, and of this court, had been otherwise.

Chancellor. See precedents.

Quere. In case there be three legatees, each to have a horse, but particularly A. the black horse, &c. and so to the

rest, and the debts so diminish the estate that the horses cannot be delivered.

Quere. If there be not a difference in such case, if the legacies were particular, viz. the black horse to A. the white to B. &c.

Bodmin contra Vandebenden.

[172]

The cause came again to be heard before the Lord Chancellor, and after long debate decreed for the plaintiff, against the lease for years and an old statute, which Vandebenden had bought in. For the Lord Chancellor said he could not imagine why a jointress should be relieved against such a lease, and not the widow, who hath dower; the jointress comes in by contract and act of the party; the dower is by act of law grounded on marriage, the act of both parties. The wife in that case is by law more favoured than the heir, and the heir should be relieved; as if a lease be made in trust to pay the debts, the lessor dieth, the heir paying the debts shall be relieved against the lease, and set it aside; and why not the wife? I can see no reason for it. And Vandebenden could not but have notice that the Lord Bodmin was married, when also Vandebenden had a statute of 10,000*l.* from the Lord Bodmin. But the defeasance thereof appeared not.

Dower.

Some of the counsel insisted on it as a strong proof, that Vandebenden had abatement in respect of the plaintiff's possibility of title; others insisted that a lease being created by the same settlement, by which the inheritance was settled only on a particular purpose, and then to wait on the inheritance, shall be never applied to other purpose in equity, but is as a *non ens*. Others pressed, that the wife, for her dower, is in law in the *per*, by her husband, and shall be entitled to clear all incumbrances, as well, and more than the husband.

Nota.—The wife had not dower executed, for the judgment in dower was with a *cesset executio* during the term.

Dominus Ward contra Dominum Meath. 1 March, 1685.

[173]

A bill was exhibited in chancery against the husband and wife for lands in Ireland. The husband appeared for himself, but departed without making answer; upon which process continued against him to a sergeant at arms, and now, the 1st of March, 1685, the plaintiff pressed for a decree against the husband and wife *pro confesso*. In the interim pending the process against the husband, the wife got an order to appear and answer; and did answer, setting forth a title to herself of the inheritance, and therefore no decree

Baron and
feme.
Wife answer
without the
husband.

Process.

Decree pro
confesso a-
gainst the
husband.

could be against her. The court decreed the bill *pro confesso* against the husband only, that he account for all the profits of the land received since the coverture, and the profits which shall be received during the coverture, &c.

Hutchins *pro def.* What if it appear upon hearing of the wife, that she hath a title?

Wife's an-
swer no an-
swer without
her husband.

Keck. We cannot proceed against the wife, for her answer is no answer, being made without the husband's answer.

Note.—By the proceedings in this cause no decree can ever be had against a feme covert for her inheritance, if the husband will not appear.

Mr. Solicitor, who was counsel for the defendant, upon reading of this report to him, told me that the defendant never did appear; but a commission being taken out for the husband and wife to appear, it was taken by the court as if he had appeared, though it was never executed for him.

Resp. *Quære*, for an essoin, or an original writ cast or taken out in the name of a party, is no extort, &c.

[174]

Barker contra Turner. 5 March, 1685.

The Case.

Copyhold.

A copyholder to him, and the heirs male of his body, purchased the fee-simple to him and his heirs; and afterwards for a valuable consideration, viz. 300*l.* sold the land and conveyed it to the defendant, who was in possession divers years. The copyholder died, leaving issue a son; a special verdict was found at common law; the question being, whether the son hath right or no?

Now the Lord Chancellor was of opinion for the purchaser, and that the conveyance was good against the heir; for the copyhold being severed from the manor, there is no means to bar it; but by conveyance at common law, the entail is not within the statute of Westminster the second.

But the Lord Chancellor took time to advise.

[175]

DE TERMINO PASCHÆ.

Anno Regis 2 Jac. II.

IN CANCELLARIA.

Holley contra Weeden. 1686.

Heir pleads
a false plea.

Thomas Castle, *anno* 1657, borrowed of the plaintiff several sums, viz. 200*l.* and bound him and his heirs by bond for payment, and died seized of the lands in fee; which descended to his daughter, and on her death without issue, to the de-

fendant, Robert, and he entered, the money being unpaid. The plaintiff, Mich. the 10th of Car. II. filed a bill against Robert, as heir, who pleaded *riens per descent*, and verdict against him at Norfolk assizes; but before the day in bank Robert died, so as the plaintiff could not have judgment, Robert left Robert, an infant, his son and heir.

Then, Trin. 31 Car. II. the plaintiff filed an original against the infant, in the common bank; and Michaelmas last, Robert, the infant, coming of age, the plaintiff declares against him on the two bonds, who pleaded *riens per descensum die brevis*, and issue was joined.

The defendant pretends that Robert, the father, by his will devised the lands to the defendant, Weeden, &c. a little before his death. [176]

The plaintiff exhibits his bill to be relieved against the will, and pressed that he ought to be relieved, for the lands were liable in land to his debt; and the plaintiff, while they were so liable, did do all the law required in suing Robert, while he was seised of the lands by descent, and renewing the suit against the infant, and must have had judgment against Robert, if the act of God, viz. the death of Robert had not prevented it: and it is not reason that a false plea should advantage and profit himself. Parker and Dee's case. And if the suit had abated by other occasion, yet in a writ by Journey's account, though Robert had aliened the land on valuable considerations; yet the land had been liable, and by the suit attached, Robert is disabled by act executed, (feoffment, fine or otherwise,) to discharge the land any more by his will.

The Lord Chancellor dismissed the bill.

Drury contra Hooke. 1686.

The plaintiff gave a bond to the defendant, conditioned in effect, that if the plaintiff married A. S. then the plaintiff to pay a certain sum of money. Broakage.
Bond

A. S. was a young gentlewoman, and had 2000*l.* portion; and the plaintiff being about sixty years of age, and having seven children, made use of the defendant to procure the marriage; and he did it, and put the bond in suit; the bill was to be relieved against the bond.

Mr. Finch and others for the plaintiff, pressed the great inconvenience of such broakage, especially in the case of young persons, and it were prejudicial to the young woman.

Serjeant Rawlinson and others *e contra*. We are defendants, not plaintiffs, and the bond is good at law; and in the case between Cressey and Croke the court gave no relief in the same case. Which was, that the lady Shipdain,

being a rich widow, lodged in Crooke's house, and Cressey agreed with Crooke that if he could get him access to the lady, he would give him a sum of money if he married her, and gave bond to pay it. The marriage proceeded, Crooke put the bond in suit: Cressey sued in chancery to be relieved, and was dismissed.

Lord Chancellor. Great difference of a widow forty-five years of age, and a young maiden that has no friends to advise her; and therefore decreed for the plaintiff.

Such bonds are of very ill consequence.

[178]

DE TERM. SANCT. MICH.

Anno Regis 2 Jac. II.

IN CANCELLARIA.

Attorney General contra Ryder. 12 October, 1686.

Legatees.

Six hundred pounds devised for ejected ministers:

First, the king had disposal of the money.

Secondly, a legatee where there were many legatees, sued for his legacy.

The executor sets forth, that there were divers other legatees, and that there was not sufficient assets to pay all; and therefore insisted, that the other legatees might be parties, that they might come into the account and abate equally, else the executor should be put to divers accounts, and the account with one will not bind the rest.

But to that the Lord Chancellor regarded not.

Thirdly, the executor sets forth a revocation of the will, by which the legacy was given.

Lord Chancellor. The will is under probate ecclesiastical, and I will not try it here: go to the ecclesiastical court, and prove it there.

Will under probate ecclesiastical not trible here.

Burton contra ——— 29 October.

[179]
Second report.

Ordered that a report made in the cause be referred back, but the defendant to pay costs if he changed not the report considerably; but no time being prefixed in that order for the master to report, by a subsequent order the report was to be made by the third of November. The master was attended several times, and a few days before the third of November gave a certificate that he was ready to report, but by reason of its length and schedules of particulars, he could not finish it within the time; and without farther order for farther time, did finish his report, which was done four or five days after the third of November: the draft of which report the

plaintiff perused, and the report was filed: the first report and the second differed 3700*l.* so that the report was to the advantage of the defendant 3700*l.* &c. but the plaintiff proceeded to the hearing of the cause: and the second report being made out of time, viz. after the time elapsed for the making thereof, the same was disallowed, and the first report decreed. But if the defendant would bring into court the money first reported, the second report should be considered. And the plaintiff got costs taxed to 140*l.* or thereabouts: and now the defendant moved, that he being also but a trustee, might be discharged of the costs, which were not settled by the decree, but imposed only as a penalty in case he caused the plaintiff to travel in the report without just cause, which he had not done, as appeared by the report.

Report made
out of time,
disallowed.

The Lord Chancellor disallowed the motion, and ordered the cost, unless the defendant would bring the money first reported into court, and shewed much displeasure against the master for making and filing the report without warrant expressing, as if it had not been gained gratis.

Lady Harvey defendant, at the suit of *Thomas Harvey*, executor to *John Harvey* her late husband.

[180]

The case was, viz.

There was a marriage agreed to be between them; she brought him a great personal estate, value 30,000*l.* and she was seized of lands of the yearly value of 1200*l.* or more, and his land about 800*l.* per annum; and both were agreed to be settled for their lives on them, remainder in tail male to their sons, and the fee-simple of her lands in default of the issue male, as she should appoint, &c. and in default of such appointment, to him and his heirs, for that there had been long love, &c. between them. Sir John Coel was indifferent counsel to draw up the conveyances; and when John Harvey came to Sir John Coel, he then took notice that if the lady's land should be settled as aforesaid, then the same would be obnoxious to sequestration: for John Harvey had been in arms for king Charles, and at that very time was secretly engaged in a plot for the king; thereupon he consulted with Sir John Coel how to avoid that mischief: who thereupon advised, and drew up the settlement with a precedent interest and estate, for years to be in trustees; in trust that the trustees, their executors, &c. should dispose of all the rents and profits of the lady's said land from time to time, as she alone should without her husband dispose, and to such persons as she alone should direct; and with a covenant by John Harvey, his executors, &c. for performance.

Parol agree-
ment against
trust by deed.

Accordingly it was done, the marriage took effect, and they lived about 20 years: John Harvey in presence of his wife

made his will, and acquainted her therewith; whereby he gave her all his jewels, and 20,000*l.* to be laid out in land, and his wife to be estated therein for her life, and gave her other legacies; but made the plaintiff Thomas his executor, and gave to him the residue of all his personal estate, and died.

(181) Some time after his death differences arose between the lady, and Thomas the executor; the matter was, viz.

John the husband and his wife living so long together, he notwithstanding the said trust excluding him from the profits, and his covenant, did constantly take all the profits, and disposed of them in house-keeping, and otherwise as he pleased, and they both made leases to tenants without the trustees; but now the lady upon the covenant would have account and satisfaction, for the profits received by her husband, from the plaintiff, who exhibits this bill to be relieved against the covenant, for that the lease for years was made only to protect the wife's estate against the violence of those times, and not to exclude the husband, but the sequestrators: and in proof hereof, Sir John Coel, who was a master in chancery many years, and of a very clear reputation, did fully depose thereto; and the change of the first intended settlement was by the appointment only of John Harvey; and though his testimony was single, the nature of the case required secrecy, and the subsequent perception of the profits without complaint or interruption by her or the trustees, and leases aforesaid, and the testimony of a woman that the lady had expressly affirmed she had not made any such, (but this testimony of the woman was not much insisted on by the plaintiff's counsel, or the court;) but there were some other settlements of personal estate to the like purpose to have been made, which were never made nor insisted on to be made: because Cromwell shortly after dying, then John Harvey thought himself out of the danger. But on the contrary, it was very fully and at large insisted on, that against conveyances by fine and deed on consideration of marriage, and so great portion, and settled by advice of counsel, the court might not relieve against a trust expressed in a deed indented; and how dangerous such a precedent would be, and the silence of the lady not interrupting or complaining of the taking of the profits during her husband's life was not considerable, for it may be that she was not willing to displease him, and she knew her husband had a great estate to leave, and hath left sufficiently to satisfy her of the covenant; on which she desired nothing in this court, but would take her remedy at law, which she hoped that the court would not hinder, and not let it be in the power of any single person of what credit or reputation soever he be of, against a settlement by deed, fine, consideration.

But on this point chiefly the court decreed for the plaintiff

against the widow, and so did Sir Harbottle Grimstone do before ; and on re-hearing of that decree it was affirmed by the Lord Finch ; and now on a third hearing confirmed by the Lord Chancellor Jefferies.

There was another matter moved and insisted on, viz. If in such case of separate maintenancé, the wife permit the husband still to receive and spend possibly in her maintenance, that the executor of the husband after his death should be put to account.

But I observed not that the Lord Chancellor now grounded his decree on that.

Hale, Executor of Rose Hale contra Anthony Thomas. Nov.

Sir Anthony Thomas, and Samuel his son and heir apparent, were bound to Rose Hale, anno 1637, each of them and their heirs in 2,000*l.* to pay Rose Hale 1300*l.* at days shortly afterwards, which was not paid ; whereupon Hale the plaintiff, as executor of Rose Hale, obtained judgment on the bond for 2,000*l.* and 12*l.* damages and costs against Samuel, and by bill in chancery, against Anthony the defendant, brother and heir of Samuel, setting forth that Samuel had died seised in fee-simple, but that Anthony the defendant had purchased in trust for himself, a precedent statute made to one Dagnall, which was satisfied in equity by perception of profits. Anthony sets forth by his answer an intail made by his grandfather, and descended to him, and denied that Dagnall's statute was satisfied. As touching the intail a trial at bar was directed ; and that the defendant should not give in evidence, the statute and a verdict was for the plaintiff against the intail. Judgment on bond.

And as touching the statute the plaintiff moved, that the defendant might either purchase and satisfy the plaintiff's judgment, or to account before a master whether satisfied or not, on penalty to pay costs of the suit, in case that the statute were satisfied. The master reports the statute satisfied, and 4,000*l.* more, viz. 1400*l.* by sale of lands, and the rest by perception of profits ; and decreed that the plaintiff should proceed at law. [183]

The costs were paid, and liberty given him to enter judgment on the verdict.

The plaintiff took out a *scire facias* in the common pleas, and hath there judgment to take execution ; which he accordingly did on the first judgment by *elegit*, and extends lands and houses of the true yearly value of 350*l.* per annum, by the extent of 40*l.* per annum.

The defendant, on affidavit of this, moves in common pleas to stay the filing of this unreasonable extent ; which the plain-

tiff opposed, because that now his debt and damages amounted to 5 or 6,000*l.* and could not be satisfied by an ordinary extent for 2012*l.*

Thereupon the defendant brought into court money in bags; (viz.) the 2012*l.* and prayed a stay of the extent, according to the books 16 H. VII. and other authorities; for the law provides for the plaintiff, that the extent at too low value shall not be obtruded on him, for in that case he may pray that the extenders shall pay him his money, and hold the lands extended at the extended value, which they must do, and shall: and on the other hand, if the extents be too low, the defendant hath his remedy by tender of the money to stay the extent, which by the laws and authorities of the books he may do before the extent is filed, and so stay the extent; or after the extent at any time, he may tender so much as remaineth to be levied by or according to the extent, and compel the plaintiff to receive it; and the extent shall thereon cease, and be discharged, and a *scire facias* lieth in that case; and for that reason the defendant hath no remedy against the extent, when once filed, but by that course; and therefore the defendant, now when the money lay in court, prayed that the extent might be stayed, and the plaintiff receive the 2012*l.* the court was satisfied that the extent ought to be stayed, but would not adjudge the plaintiff to receive it; but left that for the plaintiff to do what he would.

Thereupon the defendant took out a *scire facias* against the plaintiff, to show cause why he should not receive the 2012*l.* and the extent be stayed: to which (writ being served) the plaintiff appeared not, and judgment thereupon given in *communis banco*, that the land be discharged of any extent.

[184] But then the plaintiff petitioned the Lord Chancellor, that the cause might be reheard in chancery on the original bill, setting forth in his petition the master's report, and the stop of his extent upon this judgment; and now the cause came to be heard accordingly.

Mich. Term. 2. Jac. II. Serjeants Rawlinson and Hutchins, and Mr. Finch, Mr. North, Mr. Keck, and others, of counsel for Hale the plaintiff. The bill was opened, and the other proceedings in chancery; the equity they pretended to arise to them, because that the defendant having as the master reported, been over-paid above Bagnall's Stat. 4,000*l.* he immediately after that statute satisfied, received the profits in wrong of the plaintiff; and as some of the counsel expressed it, became a trustee, or in nature of a trustee, for the plaintiff, which had not the plaintiff been hindered from extending at that time by the false plea of the defendant, by setting forth an intail and extent falsely, the plaintiff by his extent would have had.

In answer to which the defendant insisted :

1st. That when the creditor lent the money, and chose his own security by taking a penal bond for it, he made himself judge what recompense he should have in case the obligor performed not his agreement ; so as if a man agree to do or not to do such or such a thing, and take security to do it or not to do it, this court shall never enlarge his security, and better it for him ; and to that purpose Curtis and Dawes' case was put, and Elliott and Hales' case.

And in the debate of this case, the Lord Chancellor by way of question asked the plaintiff's counsel, if a man for money takes a mortgage, and lets the interest surmount the value of the mortgage, shall this court mend it ?

As to the falshood of the answer, the answer was not a contrived known falshood ; for 1900*l.* was satisfied not by profits but sale ; and as to the intail, it was not false but true, for the land was intailed : but the plaintiff Hale at the trial produced a fine levied by Samuel Thomas our brother, which fine was not of a third part of the houses intailed, and consequently not of that third part till election of the conizee and *cestuy que use* ; which never was done, as if tenant in tail of three hundred houses or acres of land, levy a fine of one hundred ; it is no bar of all or of any part till election made, and till election the lands remain intailed : upon which grounds we first inferred, that our allegation that the land was intailed and descended so, was not false, at least it was a probable and disputable point, and not culpable to be alleged, to draw upon us a penalty beyond the penalty of a bond, as was endeavoured.

2dly. The report of the master that chargeth us with the profits of the whole land, when part was only barred, is a wrong to us, which now we may allege at the hearing of the cause at large ; for in truth the plaintiff was not apprised of this before the master.

[185]

Lastly. The plaintiff's bill being to set aside incumbrances, to the end he may have remedy at law, and had a decree that he might go to law accordingly, and in 1684, pursued that decree, and had an order to take execution on the judgment, and after took out (in pursuance of the decree,) a *scire facias* to have execution, as he did the 33d of Car. II. and judgment thereupon to take out execution without damages ; for in a *scire facias* no damages are ever given, and after that judgment took out an *elegit*, which forced us to bring in our money, or lie under that unreasonable suit, where it still remains ; and it is too late now, since he has made his election, to go from it, and it was a strange case where a man has obtained a decree to proceed at law ; and having proceeded at

law, hath got as much as the law will give him, then to fly off from his first decree and proceeding at law, to have a new and another kind of decree, and more than ever he asked in his bill. By the first decree and judgment, and proceedings, our person is not charged, but by this new proceedings he would charge our person, and turn a real charge upon our lands into a personal charge upon our person.

In the debate the Chancellor asked what remedy we had at law for our money, which we had paid into the common pleas court.

And after long debate, the court discharged the order on the petition, Nov. 1686. The Lord Chancellor, in the debate, insisted that the plaintiff had made his own election by taking execution by *elegit*.

Durston contra Sands.

[186]
Patron took
bond to re-
sign.

The defendant, patron of the church of in Gloucestershire, took a bond from the plaintiff to resign upon request.

Perpetual in-
junction.

Upon hearing the cause, a perpetual injunction was decreed against the bond.

For the court, and all sides agreed, that the bond was good; yet if the patron made use of it to his own advantage, by detaining tithes or the like, the court would relieve against the bond; and in this case the patron did detain his tithes from the plaintiff, whom he had presented; he pretended, in his answer, a *modus decimandi*, but made no proof of it, and being patron of several other churches, had taken bond from those he had presented, and made ill use of it.

Hall contra Thomas.

Vide ante
Hall.

The report of the master, which chargeth Dagnall's statute (which was precedent to the plaintiff's judgment,) to be satisfied; and upon which report the plaintiff was let in, and now the plaintiff being staid *ut supra*, from farther execution. Yet now prayed a new hearing of the original cause, insisting that by the master's report it did appear that the defendant, after Dagnall's statute satisfied, had received of the profits 500*l.* per annum, and so on the whole matter had received 4000*l.* and as soon as he had satisfaction of Dagnall's statute, he became in the nature of a trustee, and responsible to the plaintiff for the profits received.

But in regard of his taking execution by *elegit*, the Lord Chancellor would not relieve the plaintiff in that point, but inclined against the plaintiff on that point also.

But if it had come into debate, the master's report must have been re-examined, and would have failed.

1. Because there was a grand mistake therein, for he computed 500*l.* per annum, for two years, to amount to 1500*l.* which cannot be. 2. But a greater was the entail of the houses is of 300 and more, and the fine levied to bar the entail was not of 300 but of 80, or thereabouts, which in truth barred no part till election of the conizee, &c. but clearly could be no bar of more houses than are comprehended in the fine. But yet the master hath charged the yearly profit, being 500*l.* on the whole houses, in satisfaction thereof. 3. Another error in the report is, that 1900*l.* was raised by sale of part of the inheritance, which is not wholly to be so charged; for the inheritance is not to be sold to satisfy the profits, but only the annual profits.

Canning contra Hicks. 26 Dec.

Mortgagee where the mortgage was of the fee-simple to him, deviseth 100*l.* and other legacies, and then adds a devise of 100*l.* to the defendant, whom he makes executor, and dieth. Testament.
Legacy.

Two points were decreed.

1st. That the executor shall have the benefit of such a mortgage, viz. the land, and not the heir, though the land be descended to him.

2dly. That the legacy doth not bar the executor of the mortgage, though it was much pressed by Mr. Finch and others to the contrary, and that it was an implication that the executor should have no more than the 100*l.* because the testator expressly willed that the executor should not be paid his legacy till after his debts, and other legacies paid; so that the 100*l.* is as much in this case, as if he had expressly devised the 100*l.* out of the residue of his estate, after his debts and legacies paid, which doth strongly infer he meant no more than the 100*l.* not the whole residue.

The Lord of Kildare, Plaintiff, Sir Morrice Eustace and others, Defendants. [188]

A lease for fifty years was made by Sir Morrice Eustace, deceased, in trust for George Fitz Garrett: that George Fitz Garrett was attainted of treason in Ireland, and an office found, whereby the trust was forfeited to the king, and derives title to the trust by grant from the king, and prays that the defendant, who is executor to the lessee, may execute the trust, and assign the lease. The defendant, by answer, confesseth the lease and trust; but that George Fitz Garrett, who was attainted, was not the *cestuy que trust*, but another person, who in truth was a rebel in Ireland, and attainted of treason; so as the king had no title, and that if the

king had any title, yet the bill in equity did not lie ; because if all were true, yet by the act of the settlement, which gives all lands of the rebels in Ireland, which they or any in trust for them, should be to the king ; thereby the estate of the lands is in the king, and not only a trust. And sets forth farther, that those matters had been questioned in several suits, viz. whether that Sir Morrice Eustace, the lessee, were the same person who was attainted or no, or whether the estate of a trust only vested in the king ? And that the now plaintiff had had three suits by bill in equity, and also a bill in chancery, in Ireland, which he waved, (I think) dismissed, and the defendant had two verdicts at the bar in Ireland for his title, viz. that Sir Morrice Eustace, the lessee, was not the person attainted, but another of that name ; and thereupon the said Mr. E. coming into England to defend himself, the plaintiff did dismiss his bill in equity in Ireland, and exhibited this bill.

[189]

The cause being heard here, the Lord Chancellor doubted whether as this case is circumstanced, viz. after two verdicts and judgment in matters triable in Ireland, viz. which of the two was the person who was attainted, and the point in law upon the act of settlement, he could not determine it, and precedents directed to be searched. And the Chief Justice of the common pleas, and Chief Baron of the exchequer to be attended with them, which was done ; and now the cause, the said judges assisting, came to a hearing, and the plaintiff's counsel, sergeant Holt, Mr. Finch and others, argued for the plaintiff, making the question to be, whether a trust of lands in Ireland, and the trustee being here in England, this court hath jurisdiction ; for this court cannot execute their decree by sequestration, or giving possession of lands in Ireland they can compel the party ; and in the case of partition, the court here decreed account of the profits, although they dismissed the bill as to the partition of the lands. And though here the court will not grant sequestration as in the case of partition, nor name commissioners in Ireland to make the partition, yet they can compel the party to convey by imprisonment, and otherwise there would be a failure of justice ; for they in Ireland cannot relieve because the party is here, and we here because the land is not here.

So no justice could be done, and the bill dismissed.

DE TERM. SANCT. MICH.

Anno Regis 3 Jac. II.

IN CANCELLARIA.

Alderman Backwell's case. 8 Nov. 1687.

A commission of bankrupt issued against Alderman Backwell, and the creditors who sued out the commission were compounded and agreed with; and thereupon a *supersedeas* to the commission was granted. The Earl of Exeter, and a hundred other creditors, petitioned that the commission may be revived, and the *supersedeas, quia improvide emanavit*, set aside. Commission of bankrupt.
Supersedeas.

And by Pemberton Serjeant, and others, insisted;

1st. That they were the greatest number of the creditors who desired it.

2dly. The commission is *de jure* granted, and could not at first have been denied.

3dly. And when it is once granted, then all the creditors, every one of them, are interested in the benefit and proceeding of the commission equally with the rest of the creditors, at whose petition the commission was granted; so as they came in, and pray to be admitted within the four months, and tender their contribution.

4thly. And the non-petitioners now pray to be admitted, and though now the four months be past, it is not their fault, because the *supersedeas* being granted within the four months, they could not be blamed, for they had time till after four months. [191]

5thly. And seeing they were interested in the commission as well as the petitioners for the commission, the other creditors cannot hinder them from coming now into it, without which they should lose their debts.

The former debates on this matter did produce some propositions of accord, from Mr. Backwell, son and heir of the alderman; which now not being acquiesced in, &c.

Lord Keeper. I hold that the commission is *de jure*, and the statute which saith the Chancellor may grant, &c. is as if it had been, shall grant or ought to grant; but he cannot grant *ex officio*, but on request of persons interested. If twenty men swear before me, that J. S. is a bankrupt; yet without petition of a creditor I may not award a commission; but when it is once granted, if the persons that petition were well satisfied, I do think a *supersedeas* may be granted as well within the four months as after, possibly they who petition find No commission of bankrupt granted without petition of a creditor.

that it is best for them so to have it : for if their debts be by judgment, they will be preferred before others : whereas on the commission they must come in but in proportion with others, and it is *questis juris*. I will hear it, assisted by judges.

Note. When once a commission is granted, it is folly for the other creditors to sue for their debts at common law or chancery ; for if they should recover, yet it will not avail them, but they must be liable to the commission ; so if they had judgment not executed it were vain to sue execution, and therefore time is given to all creditors, viz. four months to come in ; and if they might be hindered to come in before the four months, it might be made a trick to cousin them, viz. A. hath judgment, B. sueth out a commission, compounds, &c. and takes satisfaction, gets a *supersedeas*. A. could not have execution.

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Afterwards other creditors petitioned the Lord Chancellor, Sir George Jefferies, Baron of Wem, to take off the *supersedeas*, and to renew the commission.

Which was much opposed by Mr. Blackwell, heir to the alderman, who had after the *supersedeas* granted, and granted at the suit of all the creditors, who petitioned at first for the commission, compounded and agreed with the said first petitioners.

And now the 8th of November, 1687, the Attorney General, Pemberton, Holt, Serjeants, Mr. Finch and others, argued very earnestly against the granting of the commission :

1st. Because alderman Backwell, against whom the commission was first granted, was dead, and was not in his life declared a bankrupt.

2dly. Because by the death of the king, the commission is determined, as all other commissions are ; and if the Stat. Jacobi had not provided otherwise, the commissioners could not have proceeded after the death of the bankrupt, though they had acted or dealt in the commission before the death of the bankrupt ; but the statute provides for that case, but doth not provide in case of abatement of the commission by the king's death, with whom all commissions died also ; and they argued much that by the words in the statute, viz. (dealt in) is meant a proceeding by the commissioners, (as Holt said) till distribution, (as others said) till the party were declared bankrupt.

Lord Chancellor. I am no friend to the commission of bankrupt ; it hath occasioned much hurt, and instanced in a case lately before him, wherein the charge and expenses of the commissioners, and their attendance came to 400*l.* and the distribution to the creditors 7*s.* in the pound ; each commissioner claimed 20*s.* per diem, 10*s.* half a day, &c. but as

to this case I do renew the commission for the agreement of the persons who first petitioned; for the commission cannot prejudice any other creditor that did or might come in and contribute, yea, though there should be but one such creditor for the petition; for the commission is expressly in behalf of themselves and all other creditors; and the commission is so granted, and cannot be otherwise, so as the petitioners for the commission are no more concerned than others, or any others that shall come in, and the statute that gives continuance to the commission when the bankrupt dieth, maketh it all one as if the bankrupt died not; for though he be dead, yet as to this purpose he is still living.

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Lord Chancellor to Pemberton. Suppose Backwell were living, and the king dead, might not the commissioners proceed, or grant a new commission?

Pemberton. Yea, a new commission.

Chancellor. Yes, and proceed where the other left, and their proceedings as effectual as the former, or any acting of commissioners: if it be but receiving money for contribution, (as they did of some) of the new petitioners, is a dealing within the words of the statute. And in fine he granted the commission.

Note. The *supersedeas* was granted within the time the statute gives to creditors, who did not petition to contribute; and they being now by act of court disabled, may not they after renew?

CASES

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OMITTED IN THE FORMER PART OF

CASES IN CHANCERY.

DE TERMINO PASCHÆ.

Anno Regis 26 Car. II.

IN CANCELLARIA.

Taylor contra Beversham.

The case.

Sheppard seised of a copyhold held of the manor of D. Taylor, purchased the copyhold, and after he also did purchase equity of the manor of D. and after treated with William Beversham for the purchase of the manor. Taylor gave him a particular of the manor, wherein all the parcels of the manor were ex-

pressed with their several values, but very much over-valued, as was proved. Taylor gave 4300*l.* for the manor, and Beversham paid him 4000*l.* for it, but the copyhold tenement (value 24*l.* per annum) was not in the particular. Beversham enjoyed the parcels in the particular six years, but never in that time claimed the copyhold tenement, but Taylor enjoyed it; but the conveyance was of the manor and the said parcels with this clause (all which the said Taylor purchased of Sheppard) which clause being affirmative restrained not the conveyance, but notwithstanding the copyhold passed as part of the manor, and Mr. Beversham recovered the same at law, and now this bill was to be relieved against the conveyance for the copyhold.

Mr. Attorney, Sir John Churchill, Mr. Keck, &c. The state in law is in the defendant, who used no fraud to obtain the conveyance, and by accident without any art of his, the state of the copyhold in law is in him, and conveyed to him by the plaintiff, who abused the defendant in the particular, greatly over-valuing what he sold, and the values set down; so as there is a rebutter in equity to his demand, not out of a collateral business, but in this very business; and we offer, that if the plaintiff will make good his particular, we will quit the copyhold tenement.

Relief against
a purchaser
who paid not
for it.

The Lord Keeper. I like not purchasing by a particular, it commonly breeds suits. I find Beversham abused in the particular, but since he neither treated for the tenement nor paid for it, and other small parcels of 20*s.* 10*s.* &c. value, &c. are in his particular and conveyance; this of 25*l.* per annum would not have been omitted if he had meant to purchase it, and the plaintiff never intended to sell it, which the clause also implies, therefore I decree it for the plaintiff, but he shall pay the rent arrear, and for the future hold it in all respects, so as copyhold estate subject to forfeiture and uncertain fine, &c. as it was before the regrant to him by copy, &c.

Copyhold.

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Not in issue,
yet proved.

William Strode contra Edward Strode his brother.

The bill was for evidences of the inheritance which the plaintiff claimed by descent. The defendant set forth a title to a lease made by their father to him for sixty years, but now at the hearing showed a conveyance to him by the plaintiff himself, which was proved in the books as well as the lease.

The plaintiff's counsel, myself and others allowed the lease, but prayed the writings touching the inheritance; for the proof of what is not in issue is idle, the proof must be of what is alleged, else the plaintiff is prevented from cross examining or alleging to the contrary, as if he had a reconveyance, release or the like.

Lord Keeper. I shall not decree an inheritance away against what I see; and dismissed the bill.

Street contra the Mercer's Company and Mosse.

Coats possessed of a lease for years contracted with the Bankrupt. committee of the company for a new lease, and paid part of the fine, and by Coats' consent a new lease was made to Mosse by the company, and to him executed. Coats was at the time of the treaty a bankrupt. The question was, whether the commissioners could assign the lease to the prejudice of Mosse : and Drake's case was cited.

The Lord Keeper ordered that the plea and demurrer be ousted, and the benefit thereof saved till the hearing ; he doubted of the lease ; there were other matters for the benefit of Mosse also in the plea.

DE TERM. SANCT. TRIN.

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Anno Regis 26 Car. II.

IN CANCELLARIA.

Bressenden contra Decreets.

Lawrence Owner being indebted by judgment, and seised Heir. of lands thereto liable of 300*l.* per annum, died intestate. Executor. Charles an infant, being his heir, Rebecca his wife takes administration and possessed the personal estate, and enters as guardian on the lands, and received the profits two years, and made the defendant Grace Decreets her executrix, and charged it ; she also entered as guardian, and possessed the personal estate of Lawrence and Rebecca ; Charles died, the plaintiff Bressenden his heir was compelled to pay 200*l.* on the judgment ; the defendant took out administration of Charles his estate.

The scope of the plaintiff's bill was for repayment of the money ; but the defendant pleaded her administration to Charles, and thereby to be discharged of any account of the estate of Charles, and demurred, because no administrator *de bonis non* was party.

The Lord Keeper's opinion was, that the profits taken by the guardians should be liable to make satisfaction to the plaintiff, but the personal estate in Rebecca's hand was liable in the first place in case of the heir to which the administrator *de bonis non* is liable ; and in that respect he held the bill ill, and gave the plaintiff leave to amend the bill in that point.

Gibbons contra Dawley.

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The testator gave several legacies and devised that the Testament. residue should be divided among several of his kindred by Discretion.

Fifteen ac-
cept, the six-
teenth sueth,
&c.

name, sixteen in all, in several proportions set down by him ; but devised that the quantity of the residuary estate should be as his executor voluntarily and without being thereto compelled by law should declare. The executor declared what the sum of the residue was, and accordingly paid fifteen of those legatees, but the sixteenth exhibits a bill to discover the estate, supposing it more.

After much debate the Lord Keeper disallowed the plea, saying, we must take heed that we make not such examples, under which, if men will be dishonest, they may shelter their dishonest dealings ; and what if the executor would make no declaration, this court will have an account made.

Blake contra the East India Company.

Penalty.
East-India
Company.
Trade.

The company employed Blake as their chief agent in India, and by indenture they took a covenant of him, that he should not trade for himself, nor any other in salt-peter, pepper and divers other commodities ; and Blake covenanted to pay several rates for every pound of salt-peter so traded in contrary to the covenant 6*l.* and so of divers other rates for several other commodities, which sums were some four, some five, and some seven times the value of the commodities. Blake bought the commodities for himself in India to his own use ; the company brought debt for 26,000*l.* to which sum the penalties amounted against Blake, who brought a bill to be relieved against the penalty ; and notwithstanding that he proved that it was for the benefit of the company that he so traded, for he bought none but what he sold to them at a just and market price, and that if he had not provided such goods, the company could not have been supplied, and their ships would have returned short, and what he bought was with his own money, when he had no effects of the company ; and although he had given notice of the want to the company, and he dealt with poor artificers, who could not stay, but have advance before hand, or else they would not work at all, but most probably would have been dealt with by the Dutch to the loss of the company ; and it was proved by the defendants' own witnesses that such dealings was necessary for the supply and benefit of the company ; and that the former agents for the company, and the agents for the Dutch used so to do.

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Yet my Lord Keeper dismissed the bill, though it was objected that this covenant was a greater penalty than a bond of double the value ; so it was but an artificial dividing of a penalty of a bond.

Lord Keeper. A lease is made rendering rent, and if a meadow be ploughed to pay 5*l.* rent per acre, is this relieva-

ble? I see not how the company can subsist unless such trade be restrained. Dismissed the bill.

Tyas contra Talbot and others.

The plaintiff was guardian in soccage to the infant, the other defendant, who had sustained divers suits for the infant, and paid debts to which he was liable, and assigned the guardianship to Talbot, and decreed an account; his disbursements and payment of debts to be allowed, and what due to be paid out of the infant's estate in Talbot's hands, by Talbot. The master certifies 140*l.* due, which was decreed, and Talbot, in contempt for non-payment, appeared, was examined, and set forth on examination, that the other defendant, the infant, died two days before the decree was enrolled, and the cause set down to be heard. But the contempt affirmed; for the death of the infant he had not proved; but there could be no examination thereto; but the main reason was because the Lord Keeper took it that the decree had fixed the payment on the defendant, Talbot, she having confessed assets of the infant's estate in her hands, by her answer, and therefore whatever became of the infant or his estate, she is liable. Guardian.
Contempt.

DE TERM. SANC. MICH.

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Anno Regis 26 Car. II.

IN CANCELLARIA.

Parker contra Dee.

Charles Everard, a banker, owed the plaintiff 700*l.* and was also indebted to divers other persons by book-debts, &c. without seal, and by several judgments to others, and to B. by recognizance in chancery to perform the order of the court, and that being for money there was a judgment thereon, so the recognizance and judgment was for the same debt in effect, the defendant being executor of Everard. Trin. The plaintiff sued the defendant in *communi banco* for his debt. The defendant pleaded all the judgments which were on penal bonds, and pleaded also the said recognizance *ultra quod*, &c. he had no assets; the plaintiff sued here April, 1668, to discover the truth of the plea, and debts therein set forth and the assets. Executor.
Assets.

Thereupon the defendant obtained an order that the plaintiff should make election whether he would proceed in this court or at law. The plaintiff elected to proceed here. The

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defendant used very many delays by petition and contempts to put off the hearing in this court, and paid divers of the debts which were of the same nature with the plaintiff's debts, without specialty, pending the suit in this court. The cause being heard, it was decreed to go to an account, wherein the executor was to be allowed all just debts due by record or specialty, and all debts without specialty, which were paid before the plaintiff's bill to be allowed; but not such as were paid voluntarily, pending the suit, or whereon voluntary confessed judgment were for debts without specialty.

The defendant got the Master of the Rolls, who heard the cause, to rehear it, and used other delays, and at last appealed to the late Lord Chancellor, who made a decree therein; and not content therewith, appealed to the new Lord Keeper. A case had been stated, and the cause being new heard by the Lord Keeper, the defendant pressed for dismissal, because the plaintiff had the effect of his suit to make a discovery, and it was his ignorance to choose to be dismissed before such time as he had examined his witnesses.

Lord Keeper, &c. There have been six hearings in this case, three on interlocutory orders, and three on the merits; as for the dismissal to law, because the plaintiff hath discovery here; when this court can determine the matter that shall not be an hand-maid to other courts, nor beget a suit to be ended elsewhere; the defendant hath used great shifting, and showed great partiality; his plea at law was false and deceitful, for it appears he compounded debts at smaller value, and pleaded the whole debt as due; he compounded a debt of 300*l.* for a jewel 200*l.* value, and in truth but worth 100*l.* and paid debts of the same nature as the plaintiff's, pending this suit, without compulsion by suit, which he ought not to have done; for after the suit begun the executor may not excuse himself by any voluntary payments; he may use legal delays, as imparlance and essoins, &c. to prefer one creditor before another, but he may not do it by false pleading of what lieth in his own knowledge; otherwise, if the falsity lie not in his knowledge, as *non est factum testatoris*, in this case the plea was false and fraudulent, and therefore the plaintiff here shall have the same advantage as if the same plea were found false by verdict at law, and shall have all the same consequences here as follow on a false plea at law to all intents. And all judgments voluntarily confessed after his false plea go for nothing, and decreed accordingly, account of assets with their directions; but copyhold are no assets, and the lands devised or conveyed to pay debts must be in proportion equally of debts by bond or otherwise.

Rothwell contra Sir Charles Hussey, Dame Hussey, &c.
30 Nov. 1674.

Sir Charles Hussey, father of the defendant, Charles, &c. seised in fee, made his will, and devised the lands in question to Sir Richard Markham, B. B. W. B. and White, for one and thirty years, in trust to pay his debts and portions to his daughters, and after for his heir, and died. The will is proved in common form, and Sir Richard Markham and two others of the trustees without White, the fourth trustee, by writing under their hands authorize Rose, who was Sir Charles Hussey's bailiff at the time of his death, to continue and to receive the rents, manage and let the lands, who by parol let them to one Bonnor for eleven years; Bonnor assigned to the plaintiff, who entered and enclosed, &c. There is an action at law brought by the heir, and an ejectment sealed, and judgment in both actions. The plaintiff's bill was to establish his possession, and to be relieved against the actions; the equity was because the lady Hussey detained and concealed the will, so as the plaintiff could not make his defence at law by the will, being of lands, so as the probate was not evidence; and in truth the lady had the will, and confessed she had a paper subscribed by Sir Charles Hussey, but knew not that it was her husband's will, and she did now produce it in court at hearing; yet because the plaintiff's title was but a lease parol, the Lord Keeper declared, he would never give relief. And secondly, for that the lease was a breach of trust, being by authority of three only, and he would not give relief to a lease made in breach of trust, therefore he dismissed the bill, though it was objected, that the verdicts were on the heir's title, which was contrary to the trust.

Lease parol.
Trust in four,
three lease.

Woodward contra King.

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Woodward had an injunction for keeping, &c. possession, which in truth was issued under seal, but no order, or affidavit to warrant it, but order and affidavit were after, viz. in December, though injunction was in December. One Urry delivered Mr. King a copy of the injunction, and as he swore, showed him the writ under seal. King desired Urry to show him the writ to examine the writ and copy, to see how far he was concerned in it, which Urry denied, and King thereupon delivered back the copy, but disturbed Woodward's possession. King being prosecuted for the contempt, it appeared sufficiently, that there was a disturbance and contempt; if the writ was well served it was acknowledged to be a good

Service of an
injunction.

Coke's Reports.
 Lord Keeper.
 The party below shall obey. If he will dispute he shall do it here.

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service *prima facie* ; but when sight of the original was desired it ought to be shown, as in Mackalley's case, a bailiff or sheriff makes an arrest, he need not show the *capias* ; but if the party requires to see it, he must show it, or the party is not bound to obey it ; and if the officer will not show the writ the party may resist the bailiff, and is not in contempt for his resistance ; but though it be in case of murder ensuing, is excusable, and much more is the defendant excusable where a private person, who is no officer, serves a process on him, if he refuseth to show it, when he is requested to show his warrant, viz. the writ, else it is he who serves the writ is disobeyed rather than the writ, and otherwise the inconvenience may be great ; for if an injunction be not granted, but one shows another writ and delivers the paper, and tells the person that it is a true copy of an injunction to deliver possession, or to deliver up a bond or other writings, whereas there is no such injunction ; if he will not show it, however I must believe, and either fall into contempt or lose my possession, or deliver up my writings to I know not whom ; and what remedy then ? For though in *eventu rei*, if I disobey I shall be free, because there is no ground of the writ, yet I am in danger and in doubt till I can examine it ; and suppose it be true, that such injunction was, yet possibly I knew not of it, and then it were very hard that the bare affirmation of a stranger, who served the writ, which may be is unknown to me, (and they are commonly mean persons who serve process) shall put me on a dilemma, either of contempt, or loss of possession, or the like.

But the Lord Keeper declared the service sufficient to ground the contempt ; for if he should deliver it to one party, if he kept it, how shall the rest be served with it ?

His Lordship was going to the council, else it might have been replied, that it is one thing to show it to be examined, and another to deliver it ; he was not desired to deliver it, but to show it to be examined. 2d. Such mischief may be prevented if fear be of such miscarriage by taking a duplicate.

The Lord Keeper declared, that notwithstanding the irregularity of issuing the injunction, it ought to be obeyed ; and though the disturbance which was, was by a justice of peace on view of detainer of possession with force, and there was a detainer with force, yet that should not excuse it, for then the process of this court should be subject to a justice of the peace.

Duckenfield contra Whichcott.

Rent not abated by loss or eviction of profits, etc. if no covenant.

Sir Jeremy Whichcott, warden of the Fleet, granted the same with some exceptions, to the plaintiff for 1,000*l.* in hand,

1,000*l.* per annum, and 200 ounces of plate rent : his agent Gibbon gave a particular of the chamber rents to the plaintiff, to induce the plaintiff to the bargain : afterwards on complaint of the prisoners, the judges of the common pleas reduced the rents of the chambers which the prisoners were to pay, so as they came to near a quarter less in value. The plaintiff thereon sought to be relieved, for the order is compulsory, and in nature of an eviction ; for though the thing remain, the profits which answer the rent are taken away ; but in regard there was no covenant in the assignment for the upholding the values, or that they were such :

The Lord Keeper conceived it as other cases of purchase, where it seldom happens, but things are over-valued. He dismissed the bill.

Other matters were debated, but Whichcott offered in his answer to pay back all on mutual account, &c. if the plaintiff would have his bargain. The plaintiff was put to his election to take the offer, or be dismissed.

Lingon contra Foley.

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Decreed that a devise of lands to trustees on trust out of the rents and profits, to pay debts and legacies ; the trustees may sell the land itself : this point rose on Sir Henry Lingon's will against Foley, who purchased and had notice of the will. Land sold where legacy out of profits.

2. Henry, son of Sir Henry Lingon, devised lands to be sold for payment of debts, the whole estate being incumbered : the trustees sold Stoke part of the lands, for 6,000*l.* and the trustees assigned to him several of the incumbrances bought off with his money, and allowed good, though the estate not wholly freed thereby. Incumbrances.

DE TERM. SANCT. TRIN.

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Anno Regis 27 Car. II.

IN CANCELLARIA.

Lutton contra Rodd. 21 June, 1675.

A deed in nature of a mortgage and covenant to re-convey on payment : the money was tendered at the day and place, and refused : decreed the money without interest from the time of the tender, and to re-convey, though that the plaintiff ought to make oath that the money was kept, and no profit made of it. Money refused loseth no damages.

DE TERM. SANC. MICH.

Anno Regis 27 Car. II.

IN CANCELLARIA.

Miller contra Stephens.

Trust.

Sir Lewis Pollard made a lease for years to Sir John Northcot and others for payment of his debts, and died : the reversion descended to Sir Hugh Pollard : the trustees, and Sir Hugh, assigns the term to Stephens by way of trust to pay Stephens 750*l*. Sir Hugh Pollard confesseth judgment to Miller ; Stephens receives the profits, and pays them to Sir Hugh, to the value of 800*l*. Stephens, having no notice of the judgment, nor was there any extent on the judgment.

Satisfaction.

Decreed by the Lord Keeper, that he account; and the 800*l*. not to be allowed otherwise than as to go in satisfaction of his debt, viz. Stephen's debt.

Anonymus. 5 November, 1685.

Lease renewed.
Executor.

Lessee for years subject to a trust, deviseth *resid. bonor.* the estate would but pay the debts if all sold ; he payeth the debts, and reneweth the lease for a farther term : it being a church lease, and offered to account if any profits would arise out of the old term.

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But Sir John King pressed that he could not be charged farther ; for if he pay the debts to the value, then the property is altered, and vested in him, in his own right.

Lord Keeper. The executor shall make no advantage to himself, and shall account for the new lease as well as for the old : did the executor acquaint the church with his case, and did he declare that he would renew, and take it for the time of the old term, to the benefit of the creditors and executorship, and the rest for himself ? By the French law no churchman can make a lease to any but the old tenant, unless he first be refused by the old tenant.

Lord Keeper decreed accordingly.

Anonymus. The same Day.

Purchaser
protected.

Purchaser of land incumbered with two statutes, purchaseth in a precedent statute, having no notice of the second statute.

Lord Keeper. If he had no notice of the second statute before he was dipped in the purchase, he shall defend himself by the first statute, whether the same were paid off or no, if he can at law do it, equity shall not hurt him.

Jefferson and Dawson, on Plea, &c.

An answer and plea taken by commission, was returned *ista respons. capta fuit per sacrament, &c.* So the plea was not on oath, and therefore rejected, but without costs, because the Lord Keeper apprehended it as the fault or neglect of the commissioners who took it, rather than of the defendant.

A witness demurred to an interrogatory, because he claimed interest in the land, and disallowed because she did not swear to the interest, nor what interest she claimed.

Ista respons. capta, where it was a plea.

Witness demur.

Duke contra Duke. 1675.

The bill supposed a settlement on the plaintiff in remainder after the death of Elizabeth, his former wife, and on certain conditions depending on that estate of Elizabeth, and to examine witnesses to those points. The defendant sets forth a settlement subsequent to the time, pretended for the first settlement on a second marriage, and issue of that marriage had fifteen years since; and the plea allowed; for it was alleged at bar, that in truth this bill was but an artifice to examine the second marriage, which whether it were not in the life of Elizabeth, the first wife, and so to bastardize the second children.

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Settlement.

Lord Keeper allowed the plea.

Warman contra Seaman, &c.

Nathaniel Burton settled the lands in question for 100 Tail. years, to William Warman and Julian ux. for 100 years. Trust. Julian survived, and granted the term to Penrose and Thomas Warman, on trust, in these words: that the said Penrose and Thomas Warman, their executors, &c. should suffer Julian to receive the profits thereof during her life, and for so much of the said term as should be unexpired at the time of her death upon like trust and confidence that they, their executors and assigns, or the survivor of them, will and shall, upon any reasonable request, assign all, and all their interest and right in the premises, to the issue of the body of the said Julian; and for want of such issue upon like request, they, their executors, administrators and assigns, shall assign all their interest then to come to George Warman and William Warman, brothers of the said Julian.

Julian had issue Eleanor, and died: Eleanor died without issue; the plaintiff's title was under the brothers, the defendant's under the administrator of Eleanor.

At the first hearing the Lord Keeper decreed for the plaintiff, but on a second hearing obtained by petition, he refer-

red the matter in law to Justice Rainsford, who certified his opinion for the defendant, having heard counsel on both sides.

[210] And now, viz. the 10th of Dec. 1675, gave his judgment accordingly, and dismissed the bill.

Lord Keeper. At the former hearing, I looked on Seaman as one who had, by occasion of being solicitor in a former cause, thrust himself into the title, which made me hold him to all strictness; but on the second hearing, I find him a real purchaser, and at first as though possession had gone against him all along, which appears otherwise; so those two circumstances laid out of the cause, it resteth on the matter in law, in which also my opinion was against the defendant, for these reasons:

1st. That the limitation of the issue of Julian is to be taken as to a purchaser, and consequently carrieth but an estate for life to the issue, and the conveyance or assignment to be made to the issue, though for the term to be interpreted for the life of the issue, as in Wild's case, 6 Co. and otherwise all the issues must have taken jointly, and not successively. But referring it, the judge hath certified his opinion to the contrary, and not only that it was his opinion, but as he informed me, that it was the opinion of all the judges with whom he had conferred, and gave reasons for it, which I will be made part of the order, and am content to err in such company.

Reas. 1. The whole term was to be assigned to Julian, and then there can be nothing left for the brothers; but the reason is *petitio principii*.

Issue.

Exposition.

And I am not so much moved therewith as was said by the defendant's counsel, viz, it was a contingent limitation, if I have issue, the whole term to my issue; if no issue, to my brothers.

Reas. 2. That the remainder to the brothers after a limitation to the issue of Julian, is a void limitation; for if it be taken as a remainder to the brothers, then they may not take it till all the issue of Julian, and their issues also be spent. Issue includes all, and is *nomen collectivum*, and an estate for life of a term devised to A. and after to the issue of A. and for want of issue of A. to B. It was adjudged a good remainder to B. in the king's Bench lately, but reversed in *camera scaccarii*, on error brought, and a difference taken between such limitation to children and to the issue; and cited Pears and Reeve's case in point.

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Guardian of
an infant
bound in his

Strickland Vid contra Coker.

Coker was seised for lives of the prebend of Alton, being a church-lease, in trust for Robert Strickland, an infant, on a

treaty of a marriage to be had between the infant and the plaintiff, and 1000*l.* portion to the infant's use.

An indenture was made with the consent of Coker, guardian, or pretended guardian; whereby the infant covenants that the lease should be surrendered, and a new lease taken, and the wife's life therein for her jointure. But though Coker sealed the indenture, yet there was no covenant or agreement on his part, but was made party only to show his consent. The marriage was had, the portion paid, the husband died, the lease surrendered, and the wife's life put in.

The widow sued Coker to assign for her life, and decreed accordingly; and Coker pretending the trust was in the first place to pay debts to him, it was decreed the debts should be paid out of the trust after the widow's death.

The decree was affirmed on a re-hearing.

DE TERM. SANCT. HILL.

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Anno Regis 27 & 28 Car. II.

IN CANCELLARIA.

Taylor contra Dabar. 1675.

A purchaser of the crown-lands in the time of the late war, sells part to the plaintiff, and covenants to make farther assurances. He, on the king's restitution, for 300*l.* had a lease for years made to him under the king's title.

Decree was, he should assign his term in the part he sold.

Sir Hugh Windham and Sir Robert Atkins, Plaintiffs, *Henry Lord Richardson, Bayly, and others*, Defendants.

The Case was.

Thomas Lord Richardson, seised in fee, 1663, acknowledged a statute of 1000*l.* to J. S. and the 20th of June, 1665, mortgaged the manor of Ashwood, in the county of Norfolk, to the plaintiffs, for 2000*l.* and the 22d of June, 1665, two days after, mortgaged part of the same, and other lands, (as was at first apprehended,) to the defendant, B. The mortgagor dies. Henry is heir. Bayly, the second mortgagee, agrees with Marshall, another defendant, executor of the co-neeze, to put the statute in execution at his costs, and to pay Marshall the debt due on the statute, after such time as the statute should be extended, and an assignment made thereof by Marshall to Bayly; the statute is extended in August, 1672.

Covenant to make farther assurance. The land evicted. Covenantee purchaseth it.

A. mortgageth to B. and W. to B. and after A. seised in fee of the manor of Ashwood, acknowledges a statute to B. and after [213] ter mortgageth the same manor to C. and after mortgages

The plaintiffs' bill is, that paying the debt on the statute,

part of the said manor and other lands to D. D. the second mortgagee purchaseth in B.'s stat. The first mortgagee shall not be admitted to set aside the extent on payment of what is due on the stat. without payment of what is due on the second mortgage also.

it may be set aside and assigned to them, and a decree against Richardson to pay, &c. or to be fore-closed of redemption. Bayly in his answer acknowledges the money on the statute, viz. 1200*l.* not yet paid, but offers to pay it on assigning of extent.

The question is, whether the plaintiffs shall be admitted to set aside the extent on payment of the 1200*l.* without payment of the 2000*l.* due on the second mortgage, till the statute is satisfied, according to the extended value, and not according to the justice of the debt in equity?

Object. 1. The second mortgagees are in such case protected against a former mortgage only on this reason, because they are entitled to equity by laying out their money truly on their mortgage, and are entitled in law by purchasing in the former incumbrance; so that having title in law and equity he hath only a title in equity shall not prevail against law and equity: but Bayly hath no title in law; for though the statute be extended, yet it is not assigned to him, and he hath not yet paid the 1200*l.* and the plaintiffs are ready to discharge him of that: and so offer,

Object. 2. The defendant hath in his mortgage made after the plaintiffs' mortgage, not all the lands mortgaged before to the plaintiffs, but only part thereof, and the statute covereth the whole: now, if the defendant may by the purchase of the statute thereby defend himself as to what is in his mortgage, yet he may not defend himself against the plaintiffs, as to such lands as are not in his mortgage; as if A. acknowledged a statute to B., A. being seised of the manors of E. and C. and after A. mortgageth E. to one, and C. to another; if E. purchase in the statute, he shall secure himself against all men so far as his own debt is, and also as to one mortgage but not to both.

The Lord Chancellor was strongly of opinion against the plaintiffs in both points, but some question of fact arising, viz. whether any of the lands mortgaged to the plaintiffs were in the second mortgage or no? The cause was put off on propositions.

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Witness.

Note.—If a man be named defendant who is proper to be a witness in the cause, the plaintiff must by order strike out his name before answer, but after answer he may by order examine him as a witness, though his name be not struck out of the bill, if he be otherwise competent, as if he disclaims, or have no interest, or only as a trustee.

Cartwright contra Pettus. 1675.

Ireland.

Cartwright exhibits a bill against Pettus; they were joint tenants of lands in Ireland; the plaintiff prays an account of the profits, and a partition of the lands.

12 Feb. 1675. The Lord Chancellor declared, that as to the profits the bill was good, the person being in England, for they are in the personalty; but as to the partition, which was in the realty, he could not here proceed, for he could not award a commission into Ireland: and the bill for a partition was in the nature of a writ of partition at the common law, which lieth not in England for lands in Ireland.

DE TERMINO PASCHÆ.

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Anno Regis 28 Car. II.

IN CANCELLARIA.

Charles Price, Plaintiff, and *Elizabeth Morgan* and *Herbert Evans* Defendants.

Giles Morgan, on the marriage of Cicely his daughter to Thomas Price, father of the plaintiff, agreed to pay to Wm. Price, father of Thos. 1000 marks for her portion, and Wm. Price the grandfather of the plaintiff was to settle lands on Thomas and Cicely. The settlement was made, and all the portion paid but 118*l.* 3*s.* 2*d.* which Giles Morgan did keep in his hands, because the jointure-land of Cicely was incumbered. William Price, to whom the 118*l.* was due, made his will, and thereby declared that 118*l.* should be paid to Henry his younger son in trust to take off the incumbrances on the lands, and made Henry and Anne his executors, and died anno 1634.

Mich. 1673. Thomas finding the land not discharged, exhibited his bill against Giles Morgan, his father-in-law, who owed the 118*l.* and Henry who was to receive it, and therewith to clear the estate, that the 118*l.* might be paid, and the land discharged: to his bill Giles in his answer did confess the 118*l.* to be unpaid, and that he was ready to pay it on clearing the incumbrances; the cause went on to publication, but before hearing Giles died, and made W. Morgan his executor: but yet Thomas brought on the cause to hearing, against Henry and William Morgan, executor of Giles present in court, (as the order at hearing recites) that William Morgan consented to pay the 118*l.*

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Whereupon it was decreed, the 12th of October, 15 Car. that Sir Edward Salter take the account what was unpaid of the portion, and a course directed for taking off the incumbrance; and if William Morgan will keep the money in his hands any longer, he is to pay interest.

A report was made, and a decree drawn up.

Thomas Price dieth, and Henry Price dieth ; Chas. Price paid the incumbrance out of his own estate, and takes administration of Henry Price's estate and of William's. Wm. Morgan, executor of Giles, deviseth by his will several lands to his executrix Elizabeth, and to Herbert Evans defendants, to be sold to pay his debts : the plaintiff prays satisfaction out of the personal estate of Giles and William Morgan, and out of the lands.

Debts.
Trusts.
Executors.
Waste, viz.
Devastavit.

1st. Much debate arose, whether the bill was a bill of revivor, or an original ; for after so long time the Lord Chancellor on hearing the cause, it being then represented as a revivor, ordered a dismissal : but on second hearing it appeared to be an original bill, and the decree set forth but as evidence.

2dly. But dismissed Herbert Evans, who was no executor, but devisee of lands to sell to pay debts ; for his lordship declared that such provision to pay debts, did not extend to debts of the first testator Giles, nor to make satisfaction out of the lands, if William Morgan, executor of Giles, had wasted the estate personal of Giles to the value of the debt, and so it became the debt of William in equity, and he while he lived liable in equity to make satisfaction to the value of so much as he had wasted, and in consequence the lands devised to be sold for payment of debts ought to be liable.

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Lord Chancellor. Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong : it is otherwise here, and the common law will come to it at last ; and therefore whatever estate of Giles is come to Elizabeth, or to the hands of William, which William her testator wasted the personal estate of William her testator wasted the personal estate of William in the hands of his executrix shall answer.

But the charge or duty which fell upon William by wasting the estate of Giles is not such a debt as is within his will, when he willeth his lands to be sold for payment of his debts ; for it is not properly a debt by contract, but a debt or duty arising *ex maleficio*, which I hold not within the meaning of his will. Therefore dismissed the bill as to Herbert, and let the other defendant, executrix, account according to these directions. Mosely and Maynard's case was cited at the bar.

Anonymus.

Limitation.
Stat. 21 Jac.

If a suit be in chancery for a debt for rent by lease parol or simple contract, and beginneth within time of limitation, and be dismissed after the time of limitation, the court will not order the defendant to take no advantage of the statute of limitation, see Boscowen and Boscowen's case. But if in

such suit the party be stayed by act of the court, as by injunction, &c. it is otherwise ; for the act of the court shall do no prejudice, as in case of demurrers at common law.

Inglet and Inglet.

Witnesses examined to the damage on breach of covenant not re-examined on the same interrogatory, although speaking in the first uncertainty. Re-examination.

The East India Company contra Mainston, to have an account of his employment, and charged him with divers Deceits and Omissions in his Books of Accounts, which he had sent and delivered: To which the Plaintiff pleaded. The Case on the Plea was, viz. [218]

The company had one chief factory at Bantam, and other inferior factories, as at Jambee and other places in which the factory, viz. their agent and counsel there had power to place other factors and chiefs, and to inspect their accounts, place and displace them. Bantam factory and counsel placed the defendant chief factor at Jambee, who acts in that service six years, and then gave his account to the factory at Jambee, which was there allowed, and then was again re-examined by the chief and counsel at Bantam, and sent to the company here : and here the company drew many exceptions to the defendant's accounts in writing, and sent them to the factory at Bantam to inspect and examine, which they did ; and on full perusal and examination thereof they allowed the accounts and disallowed the exceptions, and made a balance of money due to the defendant, and charged the company here with bills of exchange to pay it. The defendant returned into England ; the company paid part of the bills of exchange, and delivered to the defendant divers goods of the defendants, as pepper, &c. but now sue for an account, suggesting the same errors and deceits formerly taken and examined, and disallowed : to which the defendant pleaded the matter aforesaid, and that rested quiet till he pressed for the residue of his money due on the account and bill of exchange, and farther that divers of his vouchers were forcibly taken from him by the king of Jambee, a heathen ; and his books and many of his vouchers delivered up to the factory at Bantam, without which he could not account ; but the company now offered that he should have the use of his books. East India Company.

The Lord chancellor disallowed the plea, and that the defendant should answer ; for he said that this differed from other cases, for it was a national cause and concernment, and nothing should discharge the factors in India but a release or discharge from the company itself, else their agents may by mutual connivance ruin the company. [219]

Another point was, the company imposed a great value on commodities, prohibited by their agents to be traded in, viz. five, six, or seven times the value; yet the defendant ruled to answer though it were a penalty.

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DE TERM. SANCT. MICH.

Anno Regis 28 Car. II.

IN CANCELLARIA.

Noy contra *Ellis*.

Mortgagees.
Heir.
Administrators.

Bosistow mortgaged lands to Joseph Noy, and his heirs; the condition was to pay the money at a day to the mortgagee his heirs, executors, administrators or assigns; the money was not paid, the mortgagee entered and died; three of the defendants, as his heirs entered; Julian, wife of the mortgagee, takes administration, then brings a writ of dower against the heirs; and others bring actions of debt against the heirs on bonds, wherein the mortgagee bound him and his heirs, the wife exhibits a bill against the heirs and the mortgagor; that the mortgagor may redeem, and the heirs re-convey to the mortgagor, and that she as administratrix may receive the money; and decreed accordingly.

The objections against the decree were, viz.

1. The condition was to pay to the heirs, executors, &c.
2. The mortgagee had entered, and by his act, as far as in him lay, made it part of the real estate.
3. The plaintiff by bringing a writ of dower had so done also.

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4. There were no debts, but assets sufficient with overplus.
5. Neither were any children or portions to be paid.
6. The law gave the estate to the heirs, sisters of the mortgagee, and the administratrix came not in by the act or disposition of the mortgagee; and it were hard to take away a legal estate from the heir to give it to an administratrix, who ought to be less favoured than the heir, who always must be of the blood. An administration may be to a stranger, and whether he be or not, his title is the same only by the ordinary.

The precedent between Tilly and Egerton and others was cited.

Notwithstanding the Lord Chancellor decreed *ut supra*. He said he had considered all the precedents, and held no difference where payment was to be to the heirs and executors, &c. or to the executors only. But in case the money had been paid at the day of payment to the heir, there it was well

to the heir ; but if it were not at the day, then it should return to the personal estate, for it came from thence, and should return thither again, and said, it was needful that point should be settled ; and no matter what the law is, so it be certain, as Chief Baron Walter said ; and concluded all mortgages pertain to the personal estate, though made in fee.

Culpepper and Austin. Austin contra Culpepper.

Sir Thomas Culpepper, the father, the 29th of February, 1642, by his will in writing devised, that if all his debts might be paid out of his personal estate, or out of the rents and profits of his lands, then Henry Culpepper, his brother, and Sir Nicholas Crisp, who he recited to be estated in his lands in trust, should convey his lands to the plaintiff, his son, at his age of one and twenty years, and receive the profits in the mean time, and made them executors, and died, the plaintiff, his son and heir, being an infant.

And supposing the executors had raised sufficient to pay the debts. 1655 he exhibited his bill against the executors to have the lands, being one and twenty years of age. This bill was not prosecuted divers years, and was grounded only on the will, which in truth was revoked by a deed made by Sir Thomas Culpepper in March following, in trust, whereby the lands were conveyed to them and their heirs to sell to pay his debts ; for by the will the executors had only an authority to sell, and that of two parts ; by the deed they have the estate not only of the two parts, but of the whole ; and there were other variances in the trust limited in the will and deed.

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In 1660, the plaintiff, Culpepper, exhibited a second bill against Henry Culpepper, the executor, and others to the same effect.

And a third bill against Henry Culpepper, the executor, and Sir Robert Austin, to the same purpose : but herein charged not only the said will, but that the defendant pretending to the lands some title by some other deed or will had entered, &c. and prayed an account.

Sir Robert Austin, by lease and release, dated the 16, 17, July, 1661, by advice of Serjeant Broom, on perusal of the deed made the 9th of March, 1642, after the will, (but it seems he was not acquainted with the will,) for a full consideration, viz. 1120*l.* (actually paid 900*l.* and the rest then secured,) did purchase the lands in question, being not worth above 55*l.* per annum ; at this time Sir Robert Austin was named party in the last bill ; no process taken out against him till November, 1661.

Sir Robert Austin answered and died: Sir J. Austin, his son and heir, exhibits his bill for relief, supposing collusion between the uncle of the said heir and him; and in truth the answer of the uncle to the last bill came in the 17th day of June, 1661, the same day wherein Sir Robert Austin purchased, and paid his money; and the serving process on Sir Robert Austin in November after; and it was proved that the plaintiff offered Henry Culpepper, son of Henry, the uncle, that he would quit his father, Henry Culpepper, of all accounts, and release him, if so be he would comply with him in the accounts; for he said he intended to lay the burden upon Austin, and if he would so do he should not want for 200 angels; but the same witness, on the other part, swore he did not accept thereof, but faithfully managed the account; Culpepper's bill being brought to an hearing against Austin.

The Lord Chancellor, Ashley, heard that cause, and on hearing several orders made in Austin's cause, directed an account with special directions (*inter alia*) an account made by the uncle, in presence of the plaintiff, to be considered.

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Now Austin's cause coming to be heard by the Lord Finch, many things were moved, and that this cause could not receive any final determination till the accounts before the master were settled, which depended by several exceptions taken by Austin, whose bill was not brought on by him, but by the defendant, Culpepper, plaintiff in the other cause.

Trust to sell.

There were divers things agreed and resolved; 1. That by the trust in the will to sell, the purchaser did purchase at his own peril, if the personal estate and profits of the land received were sufficient, and afterward became insufficient.

2. But if the trust were as in the deed, the purchaser was safe; for the vendor is liable, not the purchaser. If the conveyance be to sell to pay debts, it pertains not to the purchaser in such cases to inquire if the debts be satisfied, especially when no schedule of debts is made to ground his inquiry on, else no such trust could ever be executed.

Lis pendens.

3. But in this case the heir (who is entitled to the lands after sufficient is raised, to have the lands by a trust implied, and a trust resulting on construction of the trust, though not expressed) both attach his claim by exhibiting his bill, and then no man may purchase after the bill *lite pendente*. And when the bill was exhibited against Henry Culpepper, the trustee, it will bind him and all claiming under him, *pendente lite*; and it was improvident counsel to make Austin party to give him occasion to question the account, and however now the account must go on.

Nota, no process then served.

But I objected, that then it will lie in the power of the heir

to hinder or delay sale or payment of debts, for he may exhibit a bill when he will, and no man can tell what the event will be at the end of the suit.

Anonymus. 19 December, 1676.

The Lord Chancellor Finch declared, that it was lately resolved by the lords in parliament, that the widows of peers ought to have no privilege of parliament, because they are not to be called to counsel; and cited the lady Mohun's case, though formerly they had been allowed it; but they are to have privilege of peers, not to be arrested.

Parliament privilege. Baron's widows. But 1676, resolved in the Lord's House to the contrary, that the widows had parliament privilege.

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DE TERM. SANCT. HILL.

Anno Regis 28 & 29 Car. II.

IN CANCELLARIA.

Sims contra Urry. 25 January, 1676.

The plaintiff had a bond of 40*l. quadraginta libris*, to pay 200*l.* which should have been *quadrings*. The defendant was sued in chancery as heir and executor to the obligor, the obligor having bound him and his heirs. The plaintiff had relief, though the defendant offered to admit the bond to be 400*l.* and so try it.

40*l.* bond to pay 200*l.* aided. The heir charged, and charged here as by judgment at law he should have been.

The Lord Chancellor decreed an account before a master of the profits of the land from this time, viz. of the decree, because the defendant offered not so in his answer, and at law on *oyer*, the variance would appear. Yet the defendant offered not to demand *oyer* of the bond at law; but it was now too late objected, the heir could not be bound but by writing, and this writing binds him but in 40*l.* and the executor could not pay it without a decree, without a *devastavit* to other creditors.

Lord Chancellor. When the plaintiff hath judgment here, he shall have the same advantage as at law.

Perkins contra Avery, Brown and Baker.

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Theophilus Perkins, whose executor the plaintiff is, possessed of certain pieces of hangings, put them into the hands of Avery, an upholsterer, to sell for him; but having occasion for money, desired Brown, who was a scrivener, to lend him 500*l.* which he did on the hangings, and inquired first of Avery, who was his cousin and neighbour, of the value of the hangings, who informed him of the value. Afterwards Theophilus Perkins borrowed on the hangings 100*l.* more, and

gave a judgment also for the debt, with interest, the hangings being still in Avery's hands. Avery sold the hangings at an under value; but whether Baker or Brown knew of the sale? They pretended they did not, and denied that they knew. But Avery, after his sale, desired the plaintiff, then executor of Theophilus Perkins, to sell them; who refused so to do, unless he might first see them, but could not; the money lent by Brown was Baker's, for whom Brown dealt as scrivener, as they said; but the plaintiff, nor Theophilus Perkins, his testator, did not know thereof, nor did Baker appear therein, though the securities were in his name. The plaintiff paid the money and interest; the note for judgment, and for the mortgage of the hangings, were always in Brown, the scrivener's custody, and on payment of the money delivered up to the plaintiff. But the hangings being sold before, could not be had; and Brown said he had nothing to do with Avery, (as one witness deposed at the payment, &c.) The plaintiff exhibits his bill to have the hangings, or the value in money. On a trial against Brown, Baker and Avery, directed by the court, the value of the hangings was found to be 800*l*.

The Lord Chancellor decreed the defendants to pay the money.

Brown and Baker petitioned to be re-heard, and that the decree might be explained as to them only; that there was no reason to charge them, for they put not the hangings into Avery's hands, but they were placed in Avery's hands, with power to sell them, by Theophilus Perkins, and they ought not to be charged by Avery's default.

[227] But my Lord Chancellor on long debate affirmed his former decree; for by the sale and mortgage Perkins divested his property, and the goods became Baker's, and Avery became trustee for Baker, and he must answer for his trustee Avery, who did sell them after the mortgage.

And though Brown pretends to act as a scrivener only, and as an agent to lend Baker's money, they are to be looked on as one person as to the plaintiff; for the scrivener keeping the securities for Baker, Baker trusted him thereby withal, and he had power to dispose of the moneys, and he undertakes the same by keeping the securities, and shall be answerable as Baker: and now after the long proceedings, orders, reports and trials, and decree it is too late.

Anonymus. 23 February, 1676.

Decree enrolled.
Post mortem.

Mr. Attorney moved, that a decree pronounced in Michaelmas term, that the defendant should account, since which the defendant was dead, might be enrolled.

Lord Chancellor. What good will that do you when it is but to account?

Mr. Attorney. The decree was not only to account, but for payment of certain sums.

Lord Chancellor. It hath been done, and is so at law, if judgment be pronounced it shall be entered, though the party die, let it be so here now.

DE TERMINO PASCHÆ.

Anno Regis 29 Car. II.

IN CANCELLARIA.

Craker & ux. contra Parrott & ux.

The case on proof.

Richard Spior, a citizen of London, had issue four daughters, viz. the plaintiff by his first wife, and three daughters by the defendant his second wife; and by his will devised in these words, (having given thereby several legacies:)

As to the rest of my estate, one third part is due to my children equally; therefore my will is, that the portions that I gave in advancement of my married children, shall be accounted in their shares to make their shares equal with my unmarried children; one other third part belongs to my wife, and the other third part which I have power to dispose; the legacies by me given thereout deducted, I do entrust my wife with during the time she shall continue my widow; and in case she shall re-marry, I do will and desire her to give unto my children the remainder of my estate, according as she shall think fit, and dieth.

The widow marrieth again, the remainder of the thirds after debts and legacies, was 1670*l.* &c. The executrix after her marriage, by writing recites, that her daughter Mary, who had been married by her, and her former husband, against her own inclination, and her the said Mary's husband left her one child and no maintenance, and was gone away; therefore she appoints to Mary 1074*l.* to the plaintiff 50*l.* to the other two daughters 257*l.* a-piece; so as Mary had 21 times as much as the plaintiff, and the other two daughters five times as much.

The bill complains of this unequal distribution, but was dismissed by Mr. Justice Jones; but an appeal was now to the Chancellor, who re-heard the cause, and set aside the distribution as done contrary to the trust which was reposed in her by her husband.

The points debated at the bar were:

1st. Whether the power left to the wife was not determined by her marriage, for the words are express, that he entrusts

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her for so long time, viz. as she shall continue his widow; therefore she having no power but by this clause, she cannot have the power or trust longer than she continueth his widow.

To which it was objected, that her power to dispose was, if she re-marry, to give, &c. so she must re-marry, and then give, &c.

Resp. The occasion of disposing is in case of marriage, which she may do before; as a power to limit a jointure to a wife may be executed before marriage, if marriage follow: and reason was for to trust her no longer than while she continued a widow; for when she married though she might direct, yet all the estate falls under the power of her husband.

2dly. Admitting her power ceased not in point of time by her marriage, yet so great inequality showed so much partiality to her own children above the other child, the plaintiff to whom she was a step-mother, as that the court ought to regulate it: which it was urged the court had power to do, and to dispose, as the father, if asked, would have done; and the rather in this case, for that the father when he published his will, declared to his wife what he had, and left her no charge but the plaintiff, and she said she would be kind to her, and deal with her as her own; and often in her widowhood said, the children should be equal.

This was much opposed, but my Lord Chancellor said in effect, that he went on other reasons than were touched on at the bar; he considered not the case as matter of power, but as a trust in the wife, which was to keep the children in obedience to her while a widow; but when she should marry, it was likely that the reverence of the children would not be so much as before; and therefore though he trusted her for the children equally before, yet when she should marry he seems to give her a more arbitrary power; but that doth not make the children rightless.

Then was moved, there could be no decree, because the other daughters were no parties.

Resp. They may come in before the master, or however we desire but that this distribution may be set aside.

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DE TERM. SANCT. TRIN.

Anno Regis 29 Car. II.

IN CANCELLARIA.

Elliot contra Elliot. 3 July, 1677.

Son trustee The grandfather, mortgagee, purchaseth to himself the
by the father. equity of redemption: and having two sons, the eldest took

ill courses, and had killed a man : the grandfather and the mortgagor joined in a conveyance to Thomas his youngest son, but no consideration expressed, nor trust expressed ; but the grandfather continued in possession, and leased, received the rents, and by his last will devised the lands to Thomas, but expressed not for what estate, and died.

The question was, whether the conveyance to Thomas should be taken to be in trust for the grandfather, according to the usual rule, or no ? And the question arose between the son of Thomas, and the heir at law.

Against the heir at law, and to make it no trust :

1st. Where the father purchaseth in the name of his son, it hath been frequently decreed to be an advancement and not a trust, though the father take the profits and keep possession ; and though the father after such purchase declare the trust, yet it is not good unless the trust be declared before or at the time of the purchase.

And so now the Lord Chancellor agreed.

2dly. It was objected, that the reason why this court had so as before decreed, was in pursuance of the reason of the common law : a feoffment is made by the father to the son generally, no use riseth back to the father, unless it be expressed.

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3dly. The will expressing no estate, contradicts not the rule ; but one witness doth expressly depose, that the grandfather's direction was to devise, &c. to Thomas and his heirs : and another witness deposed *ad idem*, to the best of his remembrance, and as he believed, which was not pressed as if such parol declaration could enlarge the will, but as an evidence of the trust and intent ; and there was reason to do so, because of the disorder of the elder son.

But the Lord Chancellor decreed it a trust for the grandfather, and took the difference between a son formerly married and provided for, and between a son unprovided for. In the latter case, if the father purchased land in the name of a son, and pay for it, or convey land to his son, it shall be taken not to be a trust *ut supra*, but to be an advancement or provision for the son, because the father is under an obligation of duty and conscience to provide for his child in such case ; but after he hath provided for him, he is under no farther obligation to provide more than for a stranger, and else no father could trust his child : and this difference I take, and shall always observe, and the proof is defective to alter the case.

Anonymus.

Edward Turney was indebted to Edward Denham by bond, Foreign at- and took of him divers wares to barter and trade for in the tachment.

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East Indies. Turney, in his return homeward, dieth intestate, possessed of divers goods in the ship. Daws possesseth himself of the goods, and Moyor gets them into his possession. Anthony Turney takes out letters of administration, and he brings a bill, Hill. 1673, against Daws and Moyor to discover the estate. 13 March, 1673, Moyor enters a plaint before the mayor, &c. of London, against the administrator, on a bond for money, wherein Edward Turney the intestate, was bound to him, and hath process thereon. The officer returns that he had attached Anthony Turney by goods (naming them) in the hands of Moyor, which were the intestate's, and immediately process on 14, 15, 16, 17, the same days of the same month of March, and the goods condemned in four days. Denham sueth the administrator of the intestate at law, and by *nil dicit* obtains judgment on the bond. Daws doth the like on another bond; but these judgments were after the judgment on the foreign attachment, and pending the suit in chancery by the administrator: but Denham after exhibited a bill against Turney the administrator, and Daws; but Moyor was no party to that suit, and Daws had a suit there against Turney, Moyor and Denham.

All three causes came to be heard together: decreed *int. alia*, for Daws and Moyor, to account for the estate which came to their hands, books, &c. to be brought in, the estate, over and above just allowances, to be distributed proportionably among the creditors, according as by law they ought to be paid, and that the judgment in the foreign attachment should be set aside, but the goods returned for Denham's adventure; to be no part of Edward Turney's estate. Moyor procures a re-hearing, and insisted, that his debt, being by bond, as well as the debt to Denham and daws, it was hard enough on him that the judgment which he had on the foreign attachment was set aside, for he had therein done nothing illegal, and it was lawful for him to secure his debt by any legal course; but as the decretal order is penned, he shall not only lose the benefit of his judgment, being first and precedent in time to the other judgments, but shall lose his debt; for the other judgments will be preferred before his debt by bond, unless he may aid himself by his judgment on the attachment: but he declared, and was contented that this judgment should not prejudice the other debts, but all to be payed ratably and proportionably, so that he might have a share of the estate equally, according to the proportion of his debt; but that as now the order is penned, he will be wholly excluded till the debts to Daws and Denham he paid, which may swallow the whole estate.

Chancellor. If a suit be begun in *banco regis, communi*

banco, &c. no foreign attachment for a debt, &c. shall prevent the judgment of that court, nor shall it prevent the judgment of this court, &c. and therefore I confirm the decree made, and set aside the proceedings and judgment on the foreign attachment: you forsook the high way and mistook it, and went in a by-way, therefore take your chance.

Then it was objected, that the administrator's bill was not for payment of the other debts, but only to discover the estate, and Denham no party to that suit of the administrators, and Moyer no party to Turney covenant to pay the administrator's bill; but Daws was, and Moyer no defendant to the bill of Denham, therefore he could not have any decree against Moyer as now he hath.

Decree against one who is not a party.

Chancellor. They were all brought to hearing together, and reason was that it should be so; and on hearing of them, the justice which was to be done on them all appeared, and accordingly decreed, and you shall not sever them now.

DE TERM. SANCT. MICH.

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Anno Regis 29 Car. II.

IN CANCELLARIA.

Hilliard contra George, &c.

Ferdinando George, did by articles sealed to pay Hilliard, the plaintiff's father, 2100*l.* for his interest in a plantation in Barbadoes, with covenants to enter into seven bonds for the money, 300*l.* each bond. George enjoyed the plantation, but no conveyance made to him; but Hilliard died, and made Speake and Hely executors, in trust for the plaintiff, an infant. 600*l.* was paid. Hely (five of the bonds being due,) delivered them up, and takes bonds of the same sums in the name of himself, and his two co-executors, and excused himself, because George had received a commission from the king to go to Suranam, &c. And so to mend the security, he took five new bonds; but by this 500*l.* interest was lost to the infant.

Interest lost decreed.

Lord Chancellor decreed the payment to be made according to the times of payment in the first articles; and George and Hely to be charged therewith; notwithstanding that Hely had, on taking the new bonds, released George of the articles.

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Bray contra Buffield.

Lessee for years devised the lands to his wife for her life, after her death to the heirs of her body, and for want thereof the body of A.

Term devised to A. for life, and after to the heirs of the body of A.

to J. S. and dieth. The executor consents to the legacy, the wife dieth without issue. The question was, whether the executor of the husband or the wife should have the residue of the term?

Pemberton. Had the devise been to the wife, and the heirs of her body, the whole term had been her's, and any remainder void, and the executors could have had nothing; but it is devised to her for her life, and afterwards to the heirs of her body; in which case she hath but an estate for her life, and after to her heirs, &c. Now the word (heirs) is a good word of purchase, and the heir of her body shall take by way of purchase. Put the case, the devise had been to the wife for life, and after to the heirs of a stranger, there it should have vested when it fell in the heir of a stranger as a purchaser.

Resp. I suppose he meant that the stranger, to whose heir the devise was made, was dead at the time of the devise, or at least at the time of the devisors death.

Else *quare*. And why not in this case, when a will may be expounded two ways, and one way the testator's will and meaning will take effect, but not if the will be expounded the other way, then that exposition shall be taken, which best stands with the testator's meaning; for the wife shall have it for her life, and the heir after as a purchaser; but the other way of exposition excludes the heir. In case of a freehold limited first to the ancestor, and afterwards mediately or immediately; the word heirs are a limitation; for heir and ancestor succeed, but not heir and testator of a term, and the remainder after the limitation of an entail, is void.

[237] Lord Keeper *e contra*. The testator meant an entail to the wife, which cannot be, because then there should be a perpetuity of a term; and though there be difference in words when land of freehold is devised to one for life, the remainder afterwards to his heirs, mediately or immediately; and where a term is so devised, the difference is in words, the testator's meaning is the same, and new estates, jointures and settlements, are of long terms, and a similitude is between them, &c.

Ancnymus. 21 Nov. 1677.

Pro confesso.
Tithes.
Jurisdiction.

The suit was for tithes in chancery. The defendant being in contempt for not answering, was brought by several orders to the bar; and being indeed a Quaker, refused to answer on oath, but prays to answer without oath.

Lord Chancellor did admonish him of the peril, viz. that the bill must be taken for true, entirely at it is laid, if he answered not; but he saying as before, the Chancellor pronounced

ced his decree, though Sir John Churchill, not being of counsel, but *amicus curiæ*, said that this cause for tithes, especially small tithes, was not proper for this court, and had not been used.

Chancellor decreed for the plaintiff, and referred the valuation to the master.

Manaton contra Squire. The same day.

A partition between tenants in common of a great waste Tenants in
decreed, though many reasons tending to great inconvenience, viz. want of pasture, shade, &c. common.
Partition.

Foster contra Denny. 4 Dec. 1677.

The Case.

Duke, the father, deviseth to his wife, mother-in-law to his son, the custody and tuition of his son, an infant of about seven years of age, and died. The wife marries meanly, viz. her own servant, and he dying, she married a very mean person, Foster. The uncle of the boy gets possession of him, and sends him into France, where he placed him in a Protestant College for his education. The court, on information that the child was eloiigned by the uncle, sued out a writ of *homine replegiando*, and this day was appointed to hear why the writ should not be discharged. Guardian.
Homine replegiando.

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Parliament.

Lord Chancellor. Where there is a guardianship by the common law, this court will intermeddle and order; but being here a guardian by act of parliament, I cannot remove him or her, but in this, and all other the like cases, they shall give security not to marry the child, *infra annos nubiles*, or consent, or be aiding to the marriage of such, *post annos nubiles*, during minority, without acquainting this court therewith; but I cannot restrain the infant from marriage, *ad annos nubiles*, and the uncle was ordered in this case to send for the boy home, &c.

Anonymus.

A master of a ship, so appointed by B. owner, treats with the plaintiff to take the ship to freight for 80 tons, to sail from London to Falmouth, and thence to Barcelona, without altering the voyage, and there to unload at a certain rate per ton. And to perform this, the master obliges the ship, and what was therein, valued at 300*l*. and accordingly a charter party was made and sealed between the master and merchant; but the owners of the ship no parties thereto. The master deviates, and commits barratry, and the merchant in effect loseth his voyage and goods; for the merchandize Master of a ship.
Owner.
Merchant.
Foreign sentence.

being fish, came not till Lent was past, and was rotten. The merchant's factor hereupon sueth the master in the court of admiralty at Barcelona, and upon an appeal to a higher court in Spain, hath sentence against the master and ship; which coming to his hands, viz. the merchant's hands, the owner brings an action of trover for the ship; the merchant sueth in chancery to stop this suit, and another suit brought by the owner for freight, claiming deduction out of both for his damages sustained by the master by breach of the articles by the master; for if the owner gives authority to the master to contract, or doth allow his contract, he shall be liable to loss, as well as gain, by occasion of that contract; and if he will have the gain, viz. the freight by the master's contract, he shall also bear the loss; and a contract made by my counsel is as if I make it myself, Indeed, in case of bottomry, after a voyage began, the master cannot oblige the owner beyond the value of the ship, but this case is, *ut supra*, on contract.

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Lord Chancellor. The charter party values the ship at a certain rate, and you shall not oblige the owner farther, and that only with relation to the freight, not to the value of the ship; the master is liable for deviation and barratry, but not the owners, else masters should be owners of all men's ships and estates.

Keck. If the owner had been party to the charter party, and covenanted, there should be such proceedings in the voyage, he should on non-performance thereof have been liable to the damages, and the valuation of the ship in the latter clause, viz. obliging the ship to the performance, would not excuse or lessen the damage, and the owner by assenting to the act and agreement of the master obligeth himself.

Lord Chancellor decreed *ut ante*.

The Lady Mary Cope's case.

Lunatick.

The Lady Mary Cope was found a lunatick, and on inspection found so, was committed to Mr. Guy, at the request of the Countess of Bath; and now, Sir Francis Fane her uncle, and aunt, their sister by the half blood, petitioned the Lord Chancellor for the custody; first, for that she was nearest in blood: the estate was but a jointure for life, so as no impediment, as in case of guardianship where lands may descend: and nearness of blood argueth most nearness of affection; especially Guy being a stranger; and she could not be thought to design against the life of the lunatick, and she on her death was best entitled to the administration of the estate, and consequently most engaged for the preservation of it.

Lord Chancellor. It is a question of right, but of prudence; and where no right, there is no wrong: it shall never

in this or any case be committed to any that will make gain of it; and the sister though she be not entitled to the estate, yet is concerned to out-live her, for thereby she will be entitled to the estate, and therefore settled it as before; adding, that the sister should be called to the yearly account before the master.

Then we pressed that Mr. Guy might be stinted, beyond [240] which he might not exceed.

Chancellor. Move that when the account is made, then the certainty of the estate will best appear; the allowance must be liberal and honourable.

DE TERM. SANCT. HILL.

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Anno Regis 29 & 30 Car. II.

IN CANCELLARIA.

Taylor contra Rudd. 5 Febr. 1677.

The defendant, four days after her husband's death, was asked by the plaintiff, whether she would marry again? and he gave her a guinea to have ten guineas for it if she married again. And now she being married, the plaintiff sued her and her husband to discover the promise. Catching promise.

On demurrer it was insisted on by Sir J. Churchill and others, that it was a catching-promise, and like to a wager, which this court will give no help at all unto, and was gained from her in her sorrow, and ten for one is not a conscionable bargain.

Jones' Attorney. The difference is where it is a bond penal, whereon the jury can give no less than the penalty, and this case, where the jury will, as cause is; lessen, &c. The demurrer was over-ruled, and the defendant to answer.

Atterbury contra Hawkins, &c.

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Two brothers, in the life of their father, (R. Jason) agreed by articles together, that if the father should leave or convey his estate to the eldest, he should convey a third part thereof to the younger son; and if he should convey, &c. to the younger son, then the younger son should convey a proportion, &c. to the elder. The plaintiff pretends himself by this bill to be interested in this agreement under the younger son; and Hawkins, one of the defendants, is charged to know and to discover incumbrances on the estate made by the father, &c. Hawkins demurs, because he was a scrivener, and knew nothing but as a scrivener when employed in lending money. Scrivener not privileged.

and taking securities from the father, &c. and demanded judgment if he should discover, &c. insisting that it was a general case concerning all scriveners, and all dealers with them, in lending and borrowing of moneys. The demurrer was overruled, and Hawkins put in an answer. To which answer exceptions were taken, and now came to be heard. The defendant, Hawkins, hath now set forth, in his answer the names of the persons for whom he dealt in this affair, namely the Bishop of Salisbury and others; so as the plaintiff might make them parties who are the parties concerned in interest; but he himself disclaimed all interest, but did not answer what conveyances he had made, or for what sums.

And it was said by Mr. Attorney, Mr. Keck, &c. That this would be a foundation of practice of very ill consequence, viz. that when the party concerned may defend himself, so as coming in by valuable consideration and without notice, he should not be compelled to discover any thing to prejudice or weaken his title, if he were himself party to the bill; yet by a bill against his agent, (for a scrivener in such case is no other) he shall have every thing discovered: and it was said, that the plaintiff's design was, and his endeavour had been to buy in some incumbrances precedent to the assurances made to his clients, (so he called his employers,) besides the defendant having disclaimed, the plaintiff could have no decree against him, nor any advantage by his answer; for no use thereof can be made against any others, and therefore it were better and more proper to make the other persons, whose names are discovered in the answer, parties, and put them to answer for themselves than the scrivener, no way interested, but as an agent for others; and by this way a man that is a mere stranger in interest, and knows only as a witness, may be drawn into answer a bill, and so either prepared to be a witness, or searched by his oath, what he can say, &c.

Solicitor. By the order on hearing the demurrer, the defendant was to answer, and to discover, but now would bring the same matter into debate again.

Chancellor. The bill is for discovery, and in effect the defendant bids the plaintiff go look; therefore answer what conveyances himself made, not to the former.

DE TERM. SANCT. TRIN.

Anno Regis 30 Car. II.

IN CANCELLARIA.

Anonymus.

Redemption
barred, but
no possession
to be decreed.

A mortgagee sues to have his money, or that the defendant

be barred of equity of redemption. It happened that by subsequent orders possession was ordered to the mortgagee, and contempt prosecuted for not delivering the possession; and the heir who was so prosecuted, set forth in his examination a title: and now the mortgagee would have debated the title, but not admitted because the course of the court is, and the court can go no farther in such a bill but to take away the equity of redemption, and leave the plaintiff to such title as he hath, but not to amend it; and this was the true and ancient course, though of late sometimes the contrary hath been done.

And now the Lord Chancellor agreed thereto, and discharged the contempt.

Sir Robert Henley contra ——— 12 June.

Decreed, if a guardian to an infant, whose lands are incumbered with arrears of rent to the value of 600*l.* and he hath in his hands of the infant's estate 100*l.* and buyeth the 600*l.* he shall not charge the infant with the 600*l.* [245] Guardian not advantaged by bargain.

A writ of *ne exeat regnum* granted in any case where there is danger of subterfuge from the justice of the nation, though of private concernment.

DE TERM. SANCT. MICH.

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Anno Regis 30 Car. II.

IN CANCELLARIA.

Moore contra Bennett. 14 December, 1678.

A. makes a conveyance to B. with power of revocation by will, and limits other uses if A. dispose to a purchaser by the will: another purchaser subsequent is intended to have notice of the will as well as of the power to revoke, and this is in law a notice: and so it is in all cases where the purchaser cannot make out a title but by a deed, which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is *crassa negligentia*, that he sought not after it. Notice implicit.

DE TERM. SANCT. HILL,

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Anno Regis 30 & 31 Car. II.

IN CANCELLARIA.

Wakelyn contra Warner. 13 February.

A man seised in fee devised portions to several of his children or friends, payable at several times by 50*l.* per annum, Fine bars equity.

with which sums he charged his lands to be thereout paid, and died. 50*l.* one payment incurred due ; then the lands were aliened by fine, with proclamations, five years past : the devisee sueth here for the whole, and the decree was for the plaintiff, for what grew due after the fine was barred by the fine, but not the 50*l.* due before ; for a trust is barred by fine, &c.

Warren contra —————

Enrolment
staid. Post
mortom.
Administra-
tor obtained.
Decree, and
dies intestate.

George Warren mortgaged a house in Exon for 3,000 years to Boughton, in trust for Francis Arthur George died, Thomas his son took administration to George, and Francis died, and Hester took administration to him : Thomas administrator to the mortgagor sueth Hester administratrix of Francis ; and Boughton to redeem Hester, pleads that it was no mortgage, but an absolute purchase ; but the plea was set aside on hearing, December and January 1677. on re-hearing the court decreed the estate redeemable, but there being other mutual demands, the estate was by decree to be conveyed by Hester, and Boughton the trustee, to the Sir Clerks to be under disposition of the court, and a security of what should be due on the mutual demands, and bills to be exhibited for clearing these demands, and a master to take the account of the mortgage.

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The master took up the account, and certifies the mortgage over-paid by profits 280*l.* which was now due to Thomas.

In October 1678, the other causes coming to be heard, the plaintiff Thomas made a proposition that he would quit the 280*l.* so as Hester and Boughton would assign the term and all their interest therein to him, his executors and administrators. Hester in person takes time to consider, and then consents ; and the court by consent of her and her counsel, and of the plaintiff, Thomas, decrees her quit of the 280*l.* and to assign to Thomas, his executors and administrators, and Boughton to join, and Thomas to release to Hester and her heirs his right, in certain Irish lands.

Before enrollment, Thomas dieth, his wife takes administration to him, and now moved that the decree might be enrolled, viz. 15 Jan. so as there was no laches ; for there hath no term passed since October last, when the decree was pronounced, and the decree is the act and judgment of the court, the enrollment the clerk's business, and the decree is, that the land be conveyed to Thomas, his executors and administrators, which the wife now is.

It was opposed ;

First, because Thomas had right but as administrator to George, which the wife of Thomas cannot have as administratrix to Thomas.

Secondly, the release cannot now be had to Hester, for she is heir to Francis, and George and Thomas.

The Lord Chancellor denied the enrollment, for the title of Thomas as administrator is gone.

Then it was prayed, seeing that now the administrator by suit of Thomas hath benefit, consideration he had of Thomas his costs, but denied.

Everard contra Warren.

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The defendant on account should be discharged by his oath of sums under 40s. but a party shall not by way of charge, charge another person so.

Everard, owner of some parts of a ship, took up several sums of money on bottomry: the defendant became bound with the plaintiff for the money; the plaintiff furnished the ship with merchandise: the defendant takes the ship and goods, and employs them.

Brown contra Hammond. 18 January, 1678.

The plaintiff sets forth, that he was seised of 300 acres of Fens. land in the fens, which he demised to Allison at 50*l.* rent for two years, and after at 60*l.* rent. The lessee covenants to pay all taxes, 30*l.* tax was imposed, and 3*l.* penalty incurred: The lessee having sufficient rent in his hands to pay the 33*l.* combined with the defendant, one of the conservators to defeat him of his inheritance, and forbore to pay the 33*l.* the officers appointed to sell by the laws of the fens, sell 100 acres of the 300 for the 33*l.* to the defendant, a commissioner: whereas the 100 acres were worth 400*l.* to be sold. Unreasonable sale not relieved.

The defendant denieth combination, and pleads to the rest the statute of draining, and that the sale was made according to and by virtue of those statutes.

The Lord Chancellor allowed the plea, for he could not relieve contray to an act of parliament, and if he should it would destroy the whole economy of the preservation of the fens; and compared it to the case of a mortgagor of houses in London of great value, that should be settled by the judges, according to those acts made concerning London to be rebuilt; this court shall not examine any sale on pretence of equity.

Note.—The sale is made four months after default of payment, twice in the year, and their use is to expose first ten, or fewer or more acres for the sum in arrear, and so increase till a chapman offer, &c. and never sell for more than what is in arrear of the tax and penalty, and it seems can sell for no more.

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Anonymus. 21 January. 1677.

On appeal between Gargrave alias Fan, and —

The judges and civilians on debate ruled, that the testi-

Examination
in chancery
used in dele-
gates.

mony of one Nevill, who was examined in chancery between the same parties, and cross-examined there, should be read before the delegates; though it was objected, that the appellant here should take the advantage here, which he should have had if he had been cross-examined; for cross-examining a witness sets him upright in chancery, but not here.

Shuter contra Gilliard.

The defendant was servant and kinsman to Mr. Shuter, of the Inner-Temple, deceased; and marrying the daughter of Harrison, Shuter promised to give or leave to the defendant as much in money or value, as Harrison did or should give in portion to him, and made his wife executrix, and died. The defendant sued the wife, &c. on the promise; the wife exhibited her bill to discover the truth of the promise, (for it was, if any, a very unlikely one; for Harrison might give 5000*l.* or more,) and to discover what Harrison did give, and found that in truth he had given little, and prayed relief on the bill; but the defendant proceeded to trial, and the promise being a collateral promise, and not for Shuter's own debt, and being made but a short time before the statute of the 24th of June, 1667, a special verdict was found on that matter, and therein it was also found that Harrison had given in money and value 2000*l.* and 2000*l.* damages assessed.

Verdict.

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Thereupon the executrix prayed to amend her bill, and having order so to do, set forth her verdict, and alleged that the plaintiff, Gilliard, made up the value by jewels, valued and by a will which was valued at 1000*l.* and was but 30*l.* per annum, and worth to be sold or otherwise, but 400*l.* and now prayed relief. To which the defendant pleaded the verdict, and that thereby the promise was found and damages, and that Harrison had given *pro ut*.

Examination

On hearing the demurrer and plea, the plea was allowed, and that no examination should be had as to the value of what Harrison had given. Notwithstanding the plaintiff here examined to the value of what Harrison gave, but the defendant here, as was said in regard of the order, did not examine thereto, and so should be surprised, insisting on the verdict, which expressly found the value, &c.

To which it was alleged, that the main defence being the matter in law, they ought not to be concluded by the other matter, and offered to read proof to such effect.

Lord Chancellor. Where there is right and equity, forms of the court and orders shall not hinder me to examine it; and it was so ordered.

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SELECT CASES

IN

THE HIGH COURT OF CHANCERY,

SOLEMNLY ARGUED AND DECREED,

BY THE LATE LORD CHANCELLOR,

WITH THE ASSISTANCE OF

THE JUDGES.

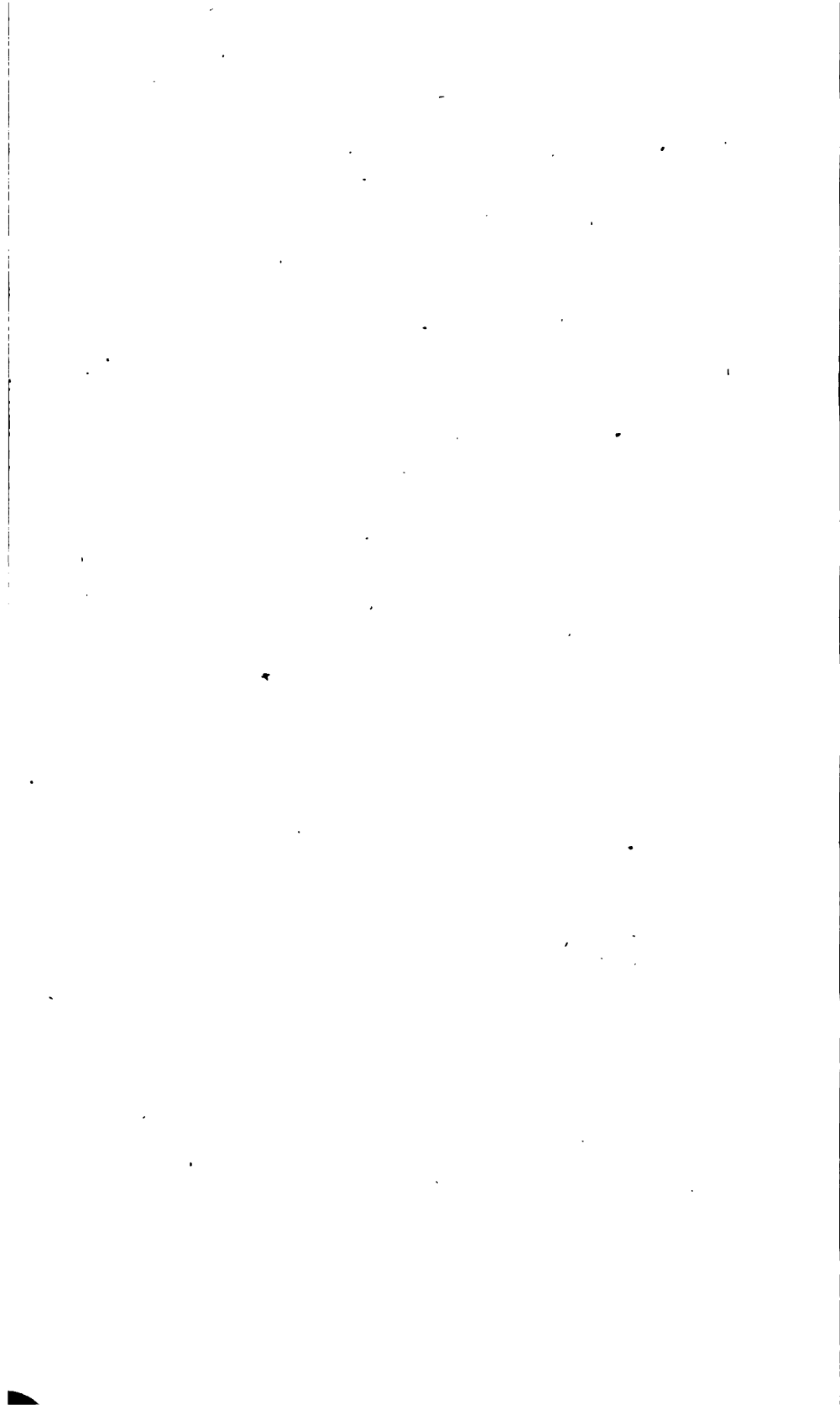
WITH AN EXACT TABLE TO THE WHOLE.

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NEW-YORK:

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1828.



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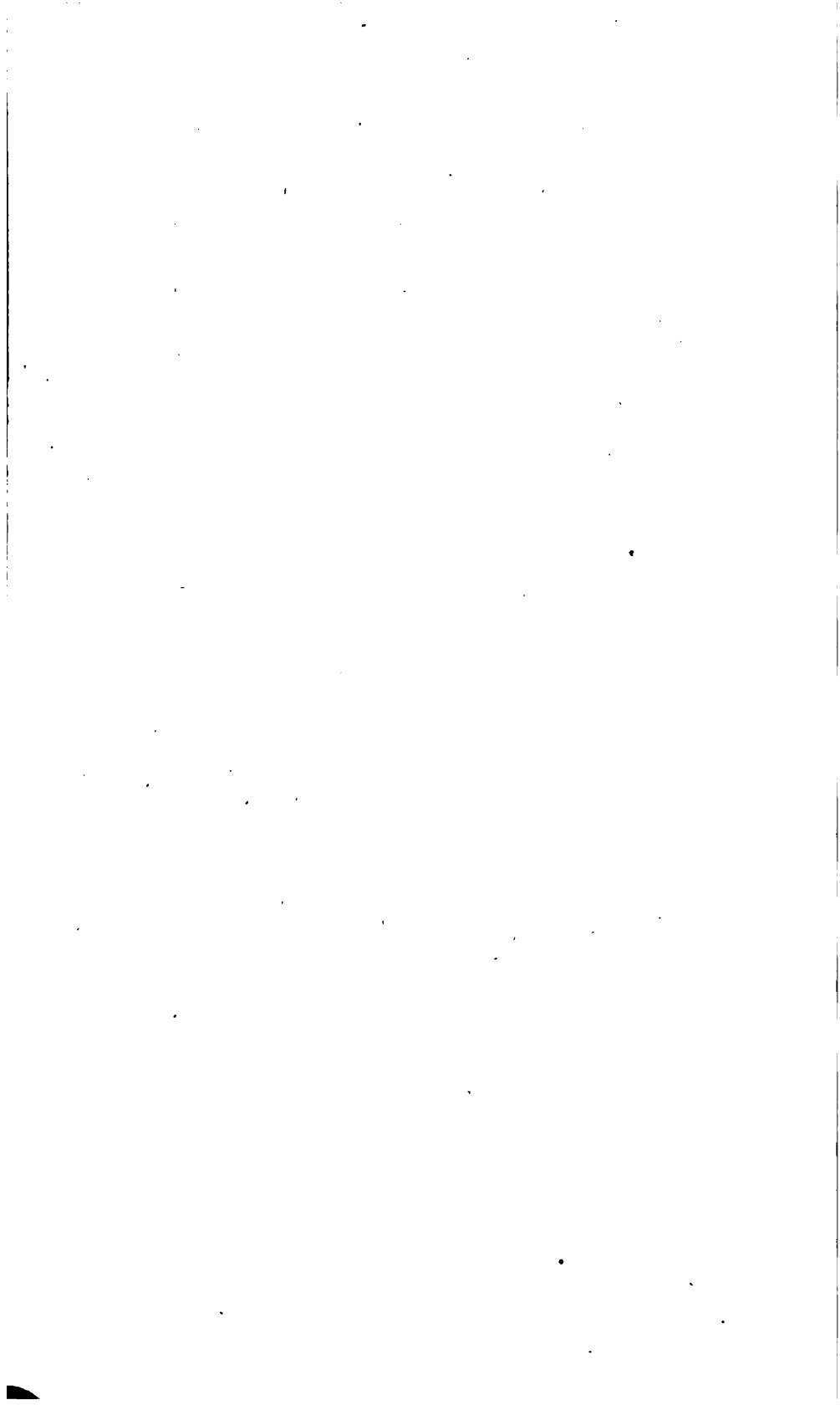
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THE DUKE OF NORFOLK'S CASE,

ON THE DOCTRINE OF PERPETUITIES.

A. bargains and sells to L. the baronies of Gr. and Br. for 10 months. 25 Martii. 1647.

A. grants the reversion of those baronies to R. and D. and their heirs to the use of A. for life, remainder to E. the wife of A. for life, remainder to R. and D. &c. for 200 years upon trusts, to be declared by another deed of the same date, remainder to H. H. his second son and the heirs male of his body, remainder to C. H. his third son, and the heirs male of his body, remainder to E. H. his fifth son, and the heirs male of his body, remainder to A. H. his sixth son, and the heirs male of his body, remainder to B. H. and the heirs male of his body, remainder to the right heirs of A. 21 Martii. 1647.

L. attornes tenant to R. and D. &c. A. makes another deed declaring the trust of the term for 200 years reciting it, and the uses in the last mentioned settlement, says in the reciting part, that 'tis intended that the term should attend the inheritance, the profits be received by H. H. and the heirs male of his body; and for default of such issue, such other persons, who according to the limitation of uses, should have had them if no such term had been, so long as T. H. eldest son of A. or any issue male of his body shall live. But in case T. H. die without issue of his body, in the life of H. H. not leaving his wife ensient with a son, or that after the death of E. H. by failure of issue male of T. H. the honour of A. should descend on H. H. then H. H. and his heirs to be excluded of the trust, then the indenture witnesseth, that the term shall be upon the trusts and under the restrained limitation and provisos after-mentioned, viz. If T. H. or any issue male of his body be living, in trust for H. H. and the heirs male of his body, until by the death of T. H. without issue male, and not leaving his wife ensient with a son, or after his death, by failure of issue male, the honour of A. descends to H. H. and in case the honour shall not descend to H. H. that after the death of H. H. the trust shall be for the heirs male of H. H. and for default of such issue in trust, to permit such other persons and their issue male respectively, to whom the freehold or inheritance is limited by the former deeds, to take the profits, as if no such lease were. And in case the honour of A. descend upon H. H. then the trust for H. H. and his issue male to cease. 21 Martii. 1647.

[2]

The Duke of Norfolk's Case,

And then as to the barony of Gr. in trust for C. H. and the heirs male of his body, remainder to C. H. and the heirs male of his body, remainder to F. H. and the heirs male of his body, remainder to B. H. and the heirs male of his body, remainder to H. H. and the heirs male of his body, remainder to the right heirs of A. the father.

And as to the barony of Br. as to one third part of it, in trust for E. H. and the heirs male of his body, remainder to F. H. and the heirs male of his body, remainder to B. H. and the heirs male of his body, remainder to T. H. and the heirs male of his body, remainder to H. H. and the heirs male of his body, remainder to the right heirs of A. And as to another third part of the barony in trust for F. H. and the heirs male of his body, with like remainders to other brothers, *ut supra*: remainders to the right heirs of A. And as to the other third part, in trust for B. H. and the heirs male of his body, with the like remainders to the rest of the brothers, *ut supra*.

A. died in 1652.

E. the wife of A. died in 1673, and then the term of 200 years commenced.

30 Nov. 1675. D. the surviving trustee at the request of H. H. assigned the term to one Marriot.

1 Dec. 1675. Marriot assigned the term to H. H.

24 Oct. 1675. H. H. by bargain and sale enrolled, sells to M. to make him tenant to the precipe for suffering a recovery.

25 Oct. 1675. The use of the recovery declared to be to H. and his heirs.

Nov. 1675. T. H. the eldest son of A. died without issue or having ever been married.

Query.

If the trust to H. H. be good, and the other trusts limited to the other brothers on the contingent, in case T. H. died, whereby the honour of A. should descend to H. H. be good or void, relievable or not relievable in a Court of Equity, the term being surrendered?

Serjeant Paton's opinion,
28 Dec. 1677.

[3]

I am of opinion, that the trusts to all the brothers of H. H. in his term are void, and no ways relievable in equity: for if these limitations, being made after T. H. shall die without issue male of his body were good in their original creation to the brothers of H. H. it must be by the attendency of the term upon the reversion of the estate which was so entailed, and then when their estates in remainder were docked by the recovery which H. H. suffered, and the trusts that attended on them were likewise destroyed, and can never survive the remainder on which they depended, no more than they could have stood alone in their original creation.

Serj. M...d's
opinion, 28
Dec. 1667.

I conceive that the trust for the term is appointed to wait upon the inheritance in the fore-part of the deed, though seeming contrary to the latter-part is not so, but both may be reconciled (that is to say) shall wait upon the inheritance upon such contingencies as hereafter is expressed, being the trust is limited and in the same order, only the contingencies of the death of T. H. without issue, &c. *prout*.

The trust of the term limited to H. H. and the heirs male of his body, with remainders over as the case is, I think is a good trust, and will go accordingly, so long as there is no charge made, though regularly a term for years cannot be entailed, yet it may be made to wait upon the inheritance that is entailed. Regularly a term for years cannot be entailed.

But when it is so limited, 'tis not properly an entail within the statute *de donis*, but governable partly in equity, and partly in law.

H. H. to whom it is so entailed may dispose of it, and thereby bind his issue without fine and recovery, as I conceive. And the term so limited in tail, shall be subject to his debts against the issue in tail, as I also conceive.

By the recovery suffered by H. H. all the entails are barred, and consequently the waiting of the term upon the inheritance destroyed, because the inheritance itself is changed; but the bare surrender of the trustee could not have that operation if nothing else had been in the case.

But the greatest question in this case, I conceive, will arise upon the death of T. H. without issue, and the other contingencies, because the trust of the term is not limited to H. H. absolutely, but to cease upon those contingencies, and then to be altered; yet seeing the main intention of the settlement was to make the term wait upon the inheritance, as by the recital of the deed, and when it changes is limited by way of inheritance.

Therefore I conceive that H. H. whilst he was owner of the inheritance and trust of the term, suffered a recovery, the contingent trusts of the term to the others are destroyed.

In law they have no relief, because the estate for years is surrendered, and I conceive the chancery will not support such leaping limitations of a term for years, especially when it cannot take effect in toto, as the contingent limitations are, and the remainders in that case will hold.

M——d.

I am of opinion that the term being limited to H. H. and the heirs of his body under other limitations than the inheritance was, the whole term vested in H. H. and the limitations thereof to the other brothers were void: for a trust of a term cannot be entailed unless it be to attend an inheritance; and the limitations of the trust differing from the limitations of the inheritance, 'tis all one as if the trust of the term was limited, without respect to any inheritance, in which case the limitations of the term to the other brothers would be clearly void. Next I take it to be clear, that taking the trust of the term to be attendant to the inheritance of the recovery, having barred the remainders of the other brothers as to the inheritance, the trust of the term must needs be wholly in H. H. and that the other brothers can never claim the same in equity; for since the inheritance (as intendant to which they could only be entitled to any part of the trust of the term) is vested wholly in H. H. and no remainder left in the brothers, there can be no remainders in any of them of the trust of the term; but as the whole inheritance is now in H. H. so doth the whole trust attend that inheritance.

[4.]

Sir William Jones's opinion, 23 Jan. 1677.

A trust of a term cannot be entailed, unless it be to attend an inheritance.

Sir William
Jones's opi-
nion, 30 Oct.
1680.

Limitation of
a trust of a
term under
contingencies,
void.

[5]

I am of opinion, that the now Duke of Norfolk and Earl of Arundel, have a good title to the said baronies. First, in law 'tis clear, that the term is surrendered; and so if any title remain to the younger brothers, it can only be in equity. And secondly, I think there is no title in equity, as to which it may be insisted upon, that if the limitations of the trust of the term were at first good; yet seeing they are chiefly to attend the inheritance, and that inheritance by the recovery is changed and made a fee simple, and this before the contingency in the limitation of the trust of the term happened, whereby the limitations of the trusts are changed, and the younger brothers cannot have the term in the same plight, nor during the same estate, as were at first designed. I say, from these considerations it may be concluded, that the limitations of the trust of the term are destroyed; but that which I do most rely upon, is, that the first limitation of the trust of this term under this contingency, was altogether void; as to which, the case is no more than that a term of 200 years is granted in trust, that H. H. and the heirs of his body shall receive the profits, until by the death of T. H. and the failure of issue male of his body, the honour of A. shall come to H. H. and in case the honour of A. shall descend to H. H. then the trust for him and the issue male of his body to cease; and then 'tis limited respectively to the younger brothers, and the heirs male of their respective bodies; I conceive these limitations to the younger brothers are void. First, it will be agreed, that the limitation of the trust of a term to one and the heirs male of his body, and for want of such issue to another, is void. As to the second, I think it as clear, that if a trust of a term be limited to one, as long as *John a Styles* hath issue of his body, and that *John a Styles* die without issue of his body, then to another, that remainder is void: likewise that which seems to make the doubt in this present case is, that the contingency must happen within a life, viz. the honour of A. descend to H. H. which must be to him in his life-time, or not at all. To which I answer, that though a contingency be remote in itself, and not likely to happen within a life, the time within which it ought to happen, or not at all, doth not alter the case, and therefore in *Child* and *Bayly's* case, reported in 2d *Croke*, 459. and by *Jones* and *Palmer*, the failure of issue was limited to be within a life, viz. a term was devised to one and his assigns, and if he die without issue of his body living at the time of his death, then to another: this was adjudged no remainder unto that other; and though it was objected that the contingency must happen within the compass of life, or not at all, yet no regard was given to that. This case seems to me in reason to be the same with ours. I do observe, that no case can be found, where limitation either by way of trust or devise of a term hath been allowed to take effect upon a failure of issue, or after death of the party to whom the first estate was limited without issue. And as in *Child* and *Bayly's* case the judges say, as I have often heard them say in other cases (that if *Matthew Manning's* case was now to be adjudged, it would not be so adjudged; and that case is) a term is demised to one for life, and after his death to

another, which is allowed good, and that they would not go a step farther. So I say, in this case it must go farther than *Manning's* case, or any other case that adjudged to make it void.

WILLIAM JONES.

The case is new, and without any express precedent, and therefore not capable of so certain a determination as would be expected, in case advice were to be given, whether a purchaser should deal in the buying of a lease or not.

Yet though there be no precedent in print, yet such like cases have been determined as guide my judgment and opinion to be (*scilicet*) that as this case is circumstantiated. Charles hath not, nor can have a right to the trust of the term, the reasons and ground of my opinion is as followeth.

First, The trust of the term for years in gross, and separate from an inheritance, cannot be entailed in possession or remainder; but yet where there is a term for years in being, if the inheritance of the land be entailed with remainders over, there the term may be limited to wait upon the inheritance, according to the several entails; and such limitation is good, so long as nothing intervenes to interrupt or disturb it.

But I conceive it is not capable of such privileges of entail as inheritance is, for the entail is confirmed by the statute of Westm. 2d de bonis; but the attendance of the term upon the inheritance entailed is not within the statute de bonis, &c. is but a creature of the chancery, and in several cases may be destroyed and barred, though no fine and recovery or other bar be made of the inheritance.

I conceive in such case if the tenant in tail alien without fine or recovery for valuable consideration, the issue in tail shall avoid the inheritance, the chancery shall never help him to avoid the lease.

In this particular case it is clear, that neither Charles nor any in remainder, can recover this term at law, but only by suit in chancery; and in chancery shall never recover where the limitation of such a term in being is not supportable in common law, which in this case it is not, as I conceive; for take the case without the contingency, that Henry was tenant in tail, remainder to Charles in tail, &c., the recovery suffered by H. would have barred Charles of the rest of the term, as well as of the inheritance.

But the sole objection here is, that the trust of the term to Henry is expressed, that it shall determine quoad Henry and his issue, in case Thomas Duke of Norfolk die without issue, living Charles, as in this case he did.

The strength of this objection lies in this: first, that the cessor of the trust is to be upon the death of a stranger without issue (*scil.*) on Thomas Duke of Norfolk, on whom the lands were not entailed. And secondly, the term is not to cease, but upon the death of Thomas Duke of Norfolk without issue in the life of Henry.

As to the first, it will make no difference in reason and in the polity of the law, where the cessor is limited on the death of a

Serj. M....d's
opinion, 20
Nov. 1688.

Trust of a
term cannot
be entailed,
yet if the in-
heritance be
entailed, the
term may be
limited to wait
on the inheri-
tance.

[6]

The Duke of Norfolk's Case,

stranger without issue, or of the tenant in tail without heir of his body. For first,

In both cases the possibility is remote, and not regarded in law, where a term is so limited, and so were there solutions in Child's and Bayly's case, and divers others.

This would be a way to set up a perpetuity, as strongly as that it was limited upon the death of the tenant in tail without issue.

Put the case, there be a father and several sons A. B. & C. and the father is seized in fee of the reversion of lands after a lease of 200 years, he settles the inheritance upon his eldest son in tail, with remainders in tail to his other sons; and this lease being in trustees for him at the same time, causes the lease to be settled in trustees in trust for the sons, to wait on the inheritance in trust accordingly, provided that the second son die without issue in the life of the father or son, the trust of the eldest son to cease.

I conceive this would not be maintained in equity, if the second son should not alien by fine and recovery.

Mic. 17 Jac.
B. R.

As to the second objection, that the cessor is on the death of Thomas without issue in the life of Henry, whereby the contingency is reduced to happen in the life of one person (viz.) Henry, and not at large (viz.) of the death of Thomas without issue, I conceive no difference made thereby, and it is in effect the point adjudged in Child and Bayly's case which was thus: French, a termor for 76 years, demises to his wife for life, remainder of the term to W. his son and his assigns, proviso, that if his son W. died without issue of his body then living, that T. his son should have the term or interest.

[7]

Mich. 23 Jac.

Adjudged then in B. R. which was three years after affirmed in the Exchequer chamber by *Hobart, Winch, Denham, Hutton, and Jones*, that the demise to Thomas was void.

In that case the contingency did expect during the life of W. only as here it is on the life of H. and the reasons of their judgments both in the King's Bench and Exchequer Chamber, in effect of all the Judges of England at that time, was because it might tend to make a perpetuity, and that this new invented way of entailing of terms is in no sort to be favoured in law.

In Child's case it was limited, if William had no issue at the time of his decease; in this case, if Thomas had no issue at the time of Henry's death.

Put case, it had been limited, that Thomas had died without issue in thirty or forty, or any number of years, or if it had been limited that Thomas had died without issue in the life of Henry, and five or six more persons, it might have been so limited as well as to one life, and the law is the same.

It is more contingent when the cessor is limited to be upon the death of Thomas without issue in the life of Henry, than it had been if Thomas had died without issue generally; for he may die without issue, though he die not without issue in the life of Henry.

First, the sum of this is, if such limitation of a term as this is, be not good at law, the trust of a term cannot be good in chancery.

Secondly, the general scope of the settlement of the term was,

that the term should wait on the inheritance in tail, which now cannot be because it is altered.

Again, if the law should be otherwise, that Charles have the whole term, then those in remainder shall be utterly defeated of it, and shall not go to Charles his son and heir, but to the executors, which never was intended by the deed. M—d.

I conceive, that notwithstanding the late judgments in chancery have been, that if a term of years be limited by way of trust, or otherwise, to any person and his heirs male, with remainders over, or other limitations to any other persons, those remainders and limitations are void, and the whole term shall be to that person and his executors and administrators, to whom it was first limited in tail; yet this case is different from all those cases, by reason this was only a temporary provision as to Mr. Henry Howard. And then the trust of the term is declared to be for the preferment of the younger sons, as is above expressed; and albeit that Marriot hath in plain breach of trust by his assignment, enabled the now Duke to destroy the term in point of law, yet the chancery may subject the lands during the remainder of the term to the trustees for the younger children, as agreeable to the intention of the deed of trust, and to all honesty and equity, and that equity I take it is in no sort barred by the fine, if a bill be exhibited at the time.

Opinions and considerations for the youngest brothers.

Sir S. C.

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J. C. 8 Jan. 1677.

I concur with this opinion, because it is no absolute trust, not so much as for the life of Henry, but a limited trust upon a contingent, which as in its creation it might, so in fact, it did happen in the life-time of Henry; and consequently there is no room for any construction to be made, that the trust of the whole term vested in Henry against the express limitation thereof. R. S.

Sir R. S.

I conceive, first, that if by act executed my Lord of Arundel had created this term to my Lord Dorchester, and the rest of the trustees in trust for Henry Howard in tail, and after his death to the brothers in tail. that had been a perpetuity, and not good for a term; though as to that, there is a difference taken in Tatten and Mollenex case, More, 809, 810. in chancery, by the Lord Chancellor, and the judges assistant; which seems to be reasonable, that the first party that is the cestui que trust against his issue, may dispose of it, but not against him in remainder; for equity preserves it as to the remainder, so then if it had been to Henry Howard and the issues of his body, the remainders to the brothers: though Henry Howard could, as to the issue, dispose of it, yet as to his brothers it stood good, if that resolution holds good, and the book says it was grounded upon precedents in that court too. But this case differs where the course of equity is against it; therefore, first there is only by this conveyance a reception of the profits in Henry Howard and the issue male of his body, until the dignity of Arundel come to him. And it is not in trust for him and his issue male; so as he has not the entire trust in him, as the other sons have by the penning of the deed.

Mr. Offley.

Secondly, 'tis not absolutely in trust in him and his issue male, but temporary in them, upon the failing of the dignity of Arundel sooner or later, and he is not a cestui que trust within any of the statutes preceding the statutes of uses, but has but a limited pursuance of the profits; but the trust vests completely in the brothers after. Thirdly, then the Marquis of Dorchester assigns the term to Marriot, and he assigning to H. H. whereby he has in strictness of law extinguished it, whereby there is a wrong and deceit done to the brothers, he is bound in equity and good conscience, to make them recompence and satisfaction for this wrong; and it appearing that H. H. was privy to this, with a design to extinguish it, and that extinguishment turning to his advantage, he is likewise compellable in equity to answer it out of his estate, either by creating a new term in this land, or by some other way, according to the resolution of the judges in my Lord of Ormond's case. Hubbard, 350.

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I have seen the opinions of Mr. Attorney-General, Serj. *Maynard*, and Serj. *Pemberton*, whose opinions I do much value, and have great esteem for. Mr. Attorney saith, that the term to H. H. and the heirs of his body, under other limitations than the inheritance was, the whole term vested in H. H. and the limitations thereof to the other brothers are void, I conceive the whole trust of the term is not limited to H. H. but part of the trust, so long as *Thomas* the deceased Duke shall have heirs male of his body, and until the earldom comes unto him; so as the trust is but a qualified and limited trust in H. H. so as the trust to H. is now ended by way of limitation to H. H. and then there is a new trust springs and arises to the younger brothers, not by way of remainder of a term, but the trust to H. H. being ended and determined, I conceive a new one may well arise and spring up to the younger children; admitting it were a trust of a term in gross, it is not a remainder, but a future contingent grant and a limitation to them, as it is in *Pell and Brown's case*.

A trust ending by way of limitation, and a new trust springing.

Secondly, if it be to attend the inheritance, then he conceives clearly, the recovery having barred all remainders, the term and the trust of the term is also barred. If this trust had been to wait upon the estate as they came in possession, it had been the stronger; but as this case is, I conceive the trust will wait upon the estate of H. H. for so long as *Thomas* lives, and hath heirs male of his body, and until the earldom come unto him, and the trust of Henry determines, and then a new trust springs up to the younger children, which is a future contingent trust, so as a common recovery can bar this trust, so long only as they did wait upon the estate of H. H. which is now determined by a collateral limitation, and the recovery cannot enlarge the trust to H. H. and make that to continue which in its creation was to end when such a contingent happens, which hath now happened; if H. H. had not suffered a common recovery, he had had an estate tail, yet no trust, this is a future contingent trust to the younger children, which cannot be barred by a common recovery.

W. ELLIS, 8 Martii 1677.

1. The surrender or grant of the lease for 200 years to Henry, nor the extinguishment of the legal interest of the term, doth not prejudice the equitable trust of the term, so long as the lands come not into other hands, viz. of a purchaser, without notice of the trust, which is not in this case.

Serjt. M....d
for the bro-
thers.

2. An entail cannot be made of a term in gross, as if a lease for 1000 years be made in trust for J. S. and the heirs of his body, with remainders over. J. S. may dispose of the whole term, and such disposal is good against his issue and those in remainder; and if he die without such disposition made by him, his executors shall have the benefit of the trust, and not his issue or the remainder.

An entail can-
not be of a
term in gross,
but may be
disposed, and
if not, shall go
to executors.

3. But a term may be limited to attend and wait on the inheritance by way of a trust, as if a long term of years be, the reversion in fee, if the reversion be purchased in fee, or settled in tail, the term may be settled to the use of the fee or tenant in tail; and in that case, if the tenant in tail die, or the tenant in fee die, the heir or issue shall have the benefit of the trust, and not the executors, &c.

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But a term
may be limited
to attend the
inheritance in
trust, be it in
fee or tail, and
there the heir
shall have the
benefit.

4. But in that case, if the tenant in fee die in debt, and no other sufficient assets to pay the debt, in that case the executors shall be preferred before the heir, although the debt be such as the heir is not bound or liable unto.

Yet if debts
be, the execu-
tors shall have
it.

5. And I conceive, that in that case, if the tenant in tail, that hath the equity of a term waiting on it, do purchase the term and alien, or obtain the trustee of the term to make an alienation of the term, it shall bind the issue in tail and him in remainder, though the alienation be by deed without fine or recovery, because the term in law is well aliened without fine, &c. And the statute of *Westm. 2d de donis* extends not to a case of a term.

Term, in law,
well alienated
without fine or
recovery.

6. Yet it is true this doth not absolutely determine the case in question upon three accounts.

First, it is a new case not yet brought in question.

Secondly, because here is a springing and a new trust by accident subsequent, and alters the trust, and changes the entail of the term to other persons, from Henry to the younger children, and on such accident takes away the trust wholly from Henry the first tenant in tail.

And thirdly, the change seemeth to be grounded on great reason; for the Lord *Maltravers* being in such condition as he was in, there was great reason to disable him and provide for the younger children, as is done by this case; and if Henry should come to be earl, and have addition of estates, that the other younger children should also have accession of estate to them, and so it is by this deed of trust provided.

But notwithstanding these reasons, and this difference of the case in these circumstances from other cases already resolved, and the contrary opinions that I have seen, I am rather of the opinion, that in this case the younger brothers are bound by the recovery suffered by Henry, than convinced that they are not bound; for I find that the reasons given *e contra*, touch not my doubt fully.

The reasons of my opinion are, viz.

1. For the recovery suffered, and the time when it was suffered (to wit) before the Lord *Maltravers* died; for till he died, Henry was tenant in tail, and had power by a recovery to bar and dispose of the whole inheritance, as well of his own estate tail, as of those in remainder: the term of years was but accessory to serve and attend the inheritance which was principal.

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2. And the only reason that made such entailing or limitation of the term good, was, because it was to wait on the inheritance, first to Henry in tail, and so successively to the other brothers; or else, as it is above said, the limitation had not been good: and when the reason fails, and the cause why it was a good limitation ceaseth and is taken away, the effect of it doth likewise cease.

3. The change of the term into thirds, doth not change the estates tail of the younger brothers, and cannot stand with the intention of the deed of trust: for I think it clear, if Charles, admitting he come to the inheritance as owner, or if in the life of Henry he could get a tenant of the freehold of all, or any part of the land to join with him, should then suffer a recovery, it would bar Edward, Francis, and Bernard, of so much of the third part whereof such recovery should be suffered, viz. of the whole inheritance, and a third of the term and the residue (to wit) the other two parts would respectively cease, and be entailed as to the term, and be wholly in the respective disposition of Edward and the rest, and go to their executors, not to their issues or the remainders.

And yet upon long consideration of the case, there is another, and a further ground of my doubt of what hath been said, viz. not only because it is a new case, and concerneth a great and noble family, but on another and further ground observed and insisted upon by such great opinions, contrary to what I have above observed, viz. that it is not only a springing and contingent use to the younger brothers, respecting them, but because the original trust to Henry, viz. that the trust to him and his issue is, as to him and them, under a limitation; and that not so long as the tenant in tail shall have issue, but so long as the Lord *Maltravers* shall have issue male, and on that reason the case is more doubtful.

M—d.

Sir W. Ellis.
A term of 1000 years cannot be entailed nor a remainder limited of it, but shall go to executors.

1. I agree, that if a man have a term for 1000 years, and he grants and demiseth this to one and the heirs male of his body, the remainder to another and his heirs, that this term cannot be entailed, nor a remainder limited upon it; and that upon the death of the party to whom the term was so given, it shall go to his executors as a chattel, and not to his heirs male.

Yet a trust of such a long term may wait on, and go along with the inheritance, &c.

2. I do conceive it will not be denied by any, that if there be a long term for years, for 1000 years, more or less in trust, and a man purchases or settles the inheritance to the use of himself for life, the remainder in tail, the remainder in fee, and declare that the trusts of the term shall wait upon those estates, and fall in with them, but that this trust of the term shall go along with all the estate, and shall not be merged in any of them, and this trust shall

not go to an executor, but shall go along with the estate, and if the tenant in tail die without issue, it shall go along with the next remainder man in tail, and after his death without issue, it shall go to him in fee simple, and attend all the estates in remainders, be they never so many. And this, I conceive, is the common course in chancery to incorporate such trusts to go with all the estates. This is not an absolute trust for Henry and the heirs male of his body, but a limited and qualified trust as long as Duke Thomas's elder brother lived, and hath heirs male of his body, and until the earldom of A. doth come unto him; so as by the death of Duke Thomas without issue, the trust to Henry, which was but a limited trust, is now determined and vanquished as to Henry.

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As this was a contingent trust in Henry, but in case Thomas was alive, and had issue when the term was to begin, so the continuance and duration of the trust of the term, was but to last until the earldom came unto him; and it is the stronger, for that this trust ends in Henry by way of limitation

How long shall Henry and his issue have this trust ?

Query.
Answer.

Until Thomas die without issue male, and the earldom of A. come unto him, both which hath happened, so as the trust for Henry and his issue is ended by way of limitation, and is now disposed over to others, as it may well be so, as this is a new trust that by a contingent subsequent declaration takes away the trust from Henry, and settles a new trust in the younger children; and it is to be considered, that Henry is to have the trust of this term, not so long as he shall have issue, but so long as the Lord *Maltravers* shall have heirs male, so as that makes it a collateral limitation or determination of the said estate.

4. The equity and justice of this trust carries much weight with me, and that condition the Lord *Maltravers* was in: it was fit to settle the trust in Henry, so long as the Lord *Maltravers* had heirs male of his body, and if they failed, and that the earldom of A. and great accession of estate to come to Henry, it was a great reason that the younger children should be provided for and taken notice of.

And it will not be easy to blow off and overthrow a trust in a Court of Equity, contrary to the express mind and intention of him that made it, for the provision of the younger children, especially it being made with so much justice and reason, wherein he hath both a respect for his honour's family and younger children.

There is one objection against all I have said, which seems *prima facie* to carry weight with it; and that is, when the legal interest is come to Henry, and he is tenant in tail in possession, and suffers a common recovery, and bars all the remainders in tail.

How can this trust which is an accessory follow estates ?

Obj.

Query.
Answer.

To which I answer first, if the trust had been to follow and wait upon the estate, this objection had been the stronger; but this trust is not absolutely to wait upon Henry's estate, but so long as Duke Thomas hath heirs male of his body, and until the earldom of A. come to him, both which are happened, he continues still tenant in tail, and yet this interest is determined in the trusts.

A future contingent interest cannot be barred.

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Secondly, this is a future contingent interest that now is happened to the younger brothers, which cannot be barred, and it may be resembled to *Pell and Brown's* case, 2 Cro. 590, 591.

A man deviseth his land to his second son Thomas and his heirs and if he die without issue, leaving William, his elder brother, then William should have it in fee; it was adjudged that this was a fee simple in Thomas the second. And though regularly one fee cannot descend on another; yet this being a future contingent interest that the devise of the fee simple to William his eldest son was good.

Another great question was, Thomas the second son suffered a common recovery, whether this did not bar the future contingent possibility of William? And it was adjudged it did not.

Now, here is as much a future contingent possibility of a trust, as there was of an estate and more, and therefore there is much reason that the future contingent possibility of a trust should not be barred by a common recovery, as in that case. And as to that which is said, that an accessory cannot be without a substance, and the estates of the younger children is to succeed, and yet they have no proper estate, for Henry is now tenant, so as this is a personal trust for the younger children independent of their estates; and if so, then clearly this recovery cannot bar their estates.

Breach of trust relieved in a court of equity,

Another reason why a court of equity should help and interpose in this case, may be, because the estate for years was conveyed by Marriot in breach of the trust, which a court of equity ought to maintain and support as much as they can.

First, because Marriot and the now duke are not purchasers for a valuable consideration.

Secondly, they came in with privity, and had notice of the trust.

to make good the intention of him that made it.

And I conceive may and will, notwithstanding these acts, make good these trusts for the younger children; and if this be a new doubtful case, certainly I conceive it is the surest and safest way for a court of equity to make good the intention of him that made it, and to preserve the trust for the younger children.

WILLIAM ELLIS, 26 Feb. 1677.

DE TERMINO S. HILL.

Anno Reg. Car. 2d Regis xxxiii & xxxiv. Anno Dom.

1681. Martis 24 die Jan.

IN CANCELLARIU.

Howard versus le Duc de Norfolk, & al'

This day being appointed for judgment in this cause, the three judges assisted the lord chancellor at the hearing, viz the Lord Chief Justice *Pemberton*, the Lord Chief Justice *North*, and the Lord Chief Baron *Montague*, came into the court of chancery, and delivered their opinions Seriatim, beginning with the Lord Chief Baron *Montague*, and so upwards; after whom the Lord Chancellor also delivered his opinion: the sum of all the arguments, as near as could be taken, were as followeth.

The argument of the Lord Chief Baron Montague.

Charles Howard is plaintiff, and the Duke of Norfolk and others are defendants. The plaintiff by his bill seeks to have execution of a trust of a term of 200 years of the barony of Grostock, which was made by Henry Frederick Earl of Arundel, and upon the bill, answers, deeds, and other passages in this cause contained, is this:

Henry Frederick Earl of Arundel by lease and release of the 20th and 21st of March, 1647, did settle the barony of Grostock and of Burgh, and several other lands to himself for life, then to the countess Elizabeth his wife for life, and then there is a term created for 99 years (which we need not mention in this case, because it is determined) and after the death of the countess, there is a term of years limited to my Lord of Dorchester and other trustees for 200 years, under a trust to be declared in a deed of the same date, with the release and the limitation of the inheritance, after this term of 200 years, is first to Henry Howard now Duke of Norfolk and the heirs male of his body, then to Mr. Charles Howard the now plaintiff, brother of the said Henry, and so to all his brothers successively in tail male, with the last remainder to the Earl of _____ and his heirs, then by a deed 21st of March 1647, the Earl declares the trust of the term of 200 years, reciting first the uses of the former deed, and therein says, it was intended that the said term should attend the inheritance, and the profits of the barony of _____ should be received for 200 years by Henry Howard now duke of Norfolk and the heirs male of his body, so long as Lord Thomas, eldest son of the said Earl of Arundel, or any issue male of his body should be living; but in case he should die without issue in the life of Henry Howard, not leaving his wife ensient with a son, or in case after the death of Thomas without issue male, the honour of the earldom of Arundel should descend to Henry

The Case.

Howard, then he and his issues to have no benefit of this term of 200 years, but it was to descend to the other brother Charles Howard the now plaintiff as hereafter is mentioned; and then comes now this indenture witnesseth, and therein the Earl declares that it should be under the limitations after specified (*viz.*) if Thomas Lord Howard had any issue male or heirs male of his body (living Henry Howard) then the trustees should have the commencement of the term in trust for the said Henry Howard, and the heirs male of his body, till such time as the Earldom should come to Henry Howard, by the death of Thomas without heirs male of his body, and after to the other brothers successively, and the heirs male of their bodies; and then doth divide the other manors with cross remainders to the five brothers, then the case goes on thus; the Earl of Arundel dies in time in 1652, Elizabeth the countess dies in 1673, then in 1675, my Lord of Dorchester the surviving trustee, assigns the term to one Marriot, he assigns it to the now Duke of Norfolk, and the Duke the 24th of October 1675, by bargain and sale makes a tenant to the Precipe, and then a recovery is suffered, and the uses of that recovery 25th of October are declared to be to the Duke and his heirs. Then Thomas Howard the former Duke died without issue, having never been married, and that is in the year 1677, whereby the honour came to the now Duke, and so to the plaintiff's bill is to have execution of the trust of the term of the barony of to the use of himself and the heirs male of his body. This I conceive was opposed by the counsel for the defendant upon these grounds:

1. That by the assignment made by Marriot to my Lord Duke Henry, the term was surrendered and quite gone.

2. The second ground was the common recovery suffered, which they say barred the remainders which the other brothers had, and so also would be a bar to the trust of this term.

3. And the other ground was, that the trust of a term to Henry and the heirs male of his body, until by the death of Thomas without issue, the earldom should descend upon him, and then to Charles, is a void limitation of the remainder.

A term may be surrendered by trustees, and merged in the inheritance, yet the trust remains in equity, and the chancery may set it up again.

As to the first, that by the assignment of Marriot to Henry Howard, the whole term was surrendered; and being so surrendered, hath no existence at all that I find, but was barely mentioned, and I think cannot be stood upon; for this the term by the surrender is gone indeed and merged in the inheritance, yet the trust of that term remains in equity; and if this trust be destroyed by him that had it assigned to him, this court has full power to set it up again, and to decree the term to him to whom it did belong, or a recompence for it, therefore I think that stands not at all as a point in the case, or as an objection in the way.

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A term attending the inheritance barred by a recovery,

As to the next thing, the common recovery now suffered by the now Duke, that doth bar the remainders to the other brothers; and so also the trust of this term: That I conceive to be so, in case this can be interpreted to be a term to attend the inheritance; and indeed in the reciting part, the deed doth seem to say,

that it was intended to attend the inheritance. But by that part of the deed which followeth after (now this indenture witnesseth) there it is limited, that the term should be to Henry Howard and the heirs male of his body, until such time as the honour of the Earl of Arundel by his elder brother's death without issue, should come to him; then to the plaintiff, which doth convey the estate of the term in a different channel from that in which the inheritance is settled; and taking this deed altogether, it doth limit this term in such various estates, that it can no way be construed to be a term attending the inheritance; and then, I conceive, the recovery doth not bar the trust, for the recovery would bar the incident to any estate, as this would do here, if it attended the inheritance; but being only a term in gross, and a collateral thing, I conceive the recovery has no operation to bar the trust in the term. Then the case singly depends upon the third point, whether the trust of a term thus limited to Henry Howard and the heirs male of his body until his brother die without issue, whereby the honour came to him with such contingent remainders over, be a good limitation, this is the question, and so in short the case is thus: a term of two hundred years is granted in trust, that Henry Howard and the heirs male of his body shall receive the profits until Thomas die without issue male of his body, and then to Charles Howard, and the heirs male of his body: and in this case, I am of opinion, that these limitations to the younger brothers upon this contingency, are absolutely void in the first creation, and are gone without the surrender; and that upon this recovery Henry Howard, now Duke of Norfolk, ought to have the trust of the whole term.

but not a term in gross, and a collateral thing.

The expositions of devises of terms, or the dispositions of the trust of terms, have proceeded by many steps to higher degrees than was at first thought of by the makers. It would be too long to give a distinct history of it: but it is so plain, that it is now a resolved and decreed thing and settled, therefore it were in vain to tell you the steps taken towards it. That the devise of a term, and the limitation of the trust of a term to one and the heirs of his body is good, though Burgess's case was only for life, the cases are very full in it. On the other side, where there is a limitation of a term to one and the heirs of his body, there a positive limitation of the estate over, after his death without issue, that I think also is as fully declared to be void. I shall not cite cases at large, but only those points and expressions in them which are peculiar and pertinent to this purpose: there is Jenkins and Kennish's case, I think it was in the exchequer, there it was said, it was such a total disposition of the term, to limit it to one and his heirs male, that it would not admit of a limitation over, but adjudged to be void. So in my Lord *Roll's* abridgments, 1 Part Tit. Devise fol. 611. 11 Car. 1. Leventhorp and Ashby's case B. R. It is said, that the remainder of a term to C. after it is limited to B and the heirs male of his body, is a void remainder; and fol 618 he puts down the reason why the remainder is void, because the limitation to one and the heirs male of his body is a full disposition of the term. And if such limitations over

The devise of a term, and limitation of the trust of a term to one and the heirs of his body, good: but a limitation over after his death without issue, void.

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were permitted, it would create perpetuities, which the law doth abhor.

Limitations over would make a perpetuity, which the law abhors, and stands not with its rules.

A term though not properly entailed, yet 'tis a disposition of the term as long as the tail lasts.

A limitation to a man and the heirs of his body, and to a man and the heirs of his body during the life of another and the

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heirs of his body, no difference.
Cro. Ja. 459.

'Sanders and Cornishe's case, Croke fol. 230. There it is resolved, that the devise of a term in such a manner with limitations after one another, to make a perpetuity, cannot be good: for, says the book, to limit a possibility, and to limit the remainder of a term, after a dying without issue, stands not with the rules of the law. Now to bring this case within these rules, and if there be a trust of a term to a man and the heirs of his body, no limitation can be over. I say then, if this estate be so limited to my Lord Duke by the name of *Henry Howard*, the other will follow when there is a limitation in tail, (though it cannot be properly stiled in tail of a term, yet it is a disposition of that term as long as the tail lasts) then there can be no limitation over. And as to that I think, as the deed is penned, it may well be stood upon, that there is an estate given to *Henry* and the heirs male of his body: for though the deed says, until by the death of *Thomas* without issue, the earldom of *Arundel* shall descend upon him; yet the first limitation I think, shall stop at the heirs male of his body, and the remainder over shall be then void. But I will not stand upon that, because I think I shall not need it, but admit (until by the failure of the issue of *Thomas* the earldom came to him) makes it not an estate to *Henry* and the heirs of his body directly, yet it gives an estate to him and the heirs of his body, as long as *Thomas* has any issue of his body, and that I count to be all one as to the operation of law; for each of the estates must determine upon the person's dying without issue, which is too remote a condition to limit the remainders of a term upon. And this until he die without issue, and as long as he shall have issue, are terms synonymous in my opinion; and so, it being a limitation to him and his heirs of his body, as long as *Thomas* liveth, and hath issue of his body, it cannot be limited over, and the rather upon comparing the former part of the deed, where there is an expression, that it was intended the estate should remain in my now Lord Duke, so long as *Thomas* lived, or had any issue of his body. Therefore, I say, there being in my opinion no difference as to operation of law, between the limitations to a man and the heirs of his own body, and to a man and the heirs of his body during the life of another, and the heirs of his body, there can be no difference in the resolution. It is as possible a disposition of the term during the continuance of an entail as the other, and therefore no remainder can be limited over.

But now the doubt in this case, that is made, ariseth upon this point, that this limitation over to the brothers, is upon a mere contingency, and whether that be good, I think, is the main question. And truly upon the reasons of *Child and Baily's case*, I cannot think it is a good limitation; that case has been so often reported, that I need not put it at large. In short, his it was; a devise by A. of a term to William his eldest son and his assigns; and if he die without issue, then to Thomas his youngest son: there the Judges of the king's bench did first deliver their opinion, that this was a void limitation to Thomas. And after it

came into the exchequer-chamber, and there, by the opinion of ten judges, it was affirmed, and the reasons of the judgment are not what was alleged at the bar in this cause; but they went upon the ground, because thereby a perpetuity would ensue; and that which was observed by one of the counsel, that the term was given to him and his assigns, was only an answer to a case put in the argument upon Child and Bailey's case, which was the case of Rhetorick and Chappell, Hill. 9 Jac. R. 889. B. R. which was cited by my Lord Chief Baron *Tanfield*, against the resolution of Child and Bailey's case, to difference it from the case then before them. And though it was urged in Child and Bailey's case, that it was given upon a contingency to the younger son, which would soon be determined, and end in a short time; yet that weighed not with the judges, but that they ruled it to be a void limitation; and I met lately with a judgment in the common pleas, which crosseth the case of Rhetorick and Chappell; it was Hill. 31 and 32 Car. II. Reg. 1615. Gibson's and Sander's case; Matthews possessed of a long term of years, having issue a son and three daughters, makes his will, and devises his chattel-leases to his son; and if that son die before marriage, or after marriage without issue, that then they should go to the daughters. The son doth marry, and dieth without issue, the daughters his executrixes, against whom an action of debt is brought upon a bond, they plead no assets; and upon a special verdict, the question being whether this were assets in their hands, it was adjudged it was.

Cro. Ja. 461.

A term limited to daughters upon the sons dying without issue, the son dies without issue, the daughters his executrixes, the term assets.

In the report of that case, there are many expressions of the court's unwillingness to extend these devises and dispositions of terms, further than the judges had gone already. The authority of this case doth much strengthen the authority of Baily's case, because it doth thwart and oppose the judgment in Rhetorick and Chappell's case.

There was also started at the bar in Pell and Brown's case, that a fee upon a fee, arising upon such a proximate contingency, as might happen in so short a time as a life, was a good limitation. It is very true, that case is so adjudged; but I think there might be such reason of difference urged between the disposition of a fee-simple and of a term; for a fee may be qualified as to a man and his heirs until a marriage take effect; but the qualifying of a disposition of a term cannot be, because when once a term is given, the qualification comes too late.

I do not think that there have been cases in this court, where a term has been limited to one and the heirs male of his body, upon a contingency, to happen first with limitations over, if that contingency do not happen; that has been a good limitation. As thus: if it be limited to the wife for life, and then to the eldest son; if he over-live his mother and the heirs male of his body, the remainder over to a younger son, there, if the eldest son die in the life of the mother, the limitation to the second son may be good. But if there be an instant estate-tail created upon a term, with remainders over, though there be a contingency as to the expectations of him in the remainder, yet there is such a total

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disposition of the term, as after which no limitations of a term can be. For that objection out of Pell and Brown's case, there is no such sure foundation to build upon in the point of a term, because that case itself has been controverted since that judgment given, in a case between Jay and Jay, in Stiles's Reports, 258 and 274, Trinit. 1661, fol. 258. Tis thus : a man seized in fee devised it to one and his heirs ; and if he die during the life of his mother, the remainder to another and his heirs.

Limitation of an inheritance after an absolute fee-simple, not good, *secus*, if upon a contingent fee-simple.

There is no opinion given ; but Roll, Chief Justice, said a limitation of an inheritance after an absolute fee-simple, is not a good limitation, because this would be to make a perpetuity, which the law will not admit ; but if it be upon a contingent fee-simple, it is otherwise : but fol. 274, where it is spoken to again by Latch, he argued, that it was not a good limitation ; and though he doth cite and confess Pell and Brown's case to be adjudged quite contrary to what he argued, yet he tells you, that the judges did find such inconveniencies arising upon it, that the court was divided upon a like case, ; and says further, that within nine years after that judgment, 21 Jac. it was made a flat query in the serjeant's case ; and adds moreover, that it hath been ever since disputable, and cites a case, and gives you a roll, but not the parties' names, Mich. 37 and 38 Eliz. C. B. Rol. 1149. wherein, says the book, after solemn arguments both at bar and bench, it was adjudged quite contrary to Pell and Brown's case : but admit that case to be good law, where will you stop, if you admit the limitation of a term after an estate-tail, where shall it end ? for if after one, it may as well be after two ; and if after two, then as well after twenty ; for it may be said, if he die within 20 years without issue, and so if within 100 ; and there will be no end ; and so a perpetuity will follow. It was said at the bar, it will be hard to frustrate the intention of the parties : to that I answer, intentions of parties not according to law, are not to be regarded. It was the intention in Child and Baily's case, that the younger son should have it ; and so in Burgess's case, it was the intention the daughter should have it ; and so in Gibson's and Sommers's case, it was intended for the daughters ; yet all these intentions were rejected ; and therefore as to that, it is not at all to weigh any thing in the case.

Intention of parties not according to law, are not to be regarded.

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It has also been objected, but then here is a contingency that has actually happened upon Thomas's death without issue. and so the honour is come to Henry. I say the happening of the contingency is no ground to judge.

The limitation good upon it, was not good if the other limitation had stood out, and that I conceive is our case. So then for that I think these expositions have gone already as far as they can ; for my part I cannot extend it any further, and therefore I conceive in this case, the plaintiff has no right to this term, but the decree ought to be made for the defendants.

The Argument of the Lord Chief Justice North.

I shall not trouble your Lordship to repeat the case again, for it has been truly opened by my Lord Chief Baron, nor shall I trouble you with any long argument, because I think there is but one point in the case, and that a short one: the only point is this, whether this contingent trust of a term limited to Charles, upon the dying of Thomas without issee male, whereby the honour did descend to Henry, be good in point of creation and limitation; for the other two points will not trouble the case: for as to that point of the recovery, in case this be not a good limitation in point of creation, it will make nothing in the case, for it is gone without the recovery. In case it be good in point of creation, the recovery will do nothing; for that supposeth it to go along with the inheritance: and if this take effect, then it will suffer no prejudice by the recovery. Then for the assignment of Marriot to the Duke, that signifieth nothing in the case; it doth indeed show, that if your lordship shall decree this cause for the plaintiff, then he hath committed a breach of trust; but if for the defendant, then it is of no weight at all. If the law be for the plaintiff, then he must answer for this breach of trust, and so must the duke; for it is a surrender to a person that had notice of the trust. So that the question is barely upon that single first point, whether it be a good limitation upon the contingency to Charles, this which they call a springing trust. My Lord, I take the rules of this court, in cases of trusts of terms, to be the same with rules of law in devises of terms: for I conceive the rules of law to prevent perpetuities, are the polity of the kingdom, and ought to take place in this court, as well as any other court. So I take it then, that the trust of a term is as much a chattel, and under the consideration of this court, as the term itself; and therefore I cannot see, why the trust of a term upon a voluntary settlement, should be carried further in a court of equity, than the devise of a term in the courts of common law. It is true, where there is a long term in being upon mortgage, and as a security which is determined, it is of great conveniency that it should be kept on foot to protect the inheritance; and so it will lie still to wait upon the inheritance, and thereupon in many descents it will go from heir to heir, and that upon a particular consideration, to attend and protect the inheritance: but for a mere chattel to go from heir to heir, is not the same case; nor do I see any reason why this court should carry such a chattel any further, than devises of terms are carried at common law.

The only point.

The rules of law to prevent perpetuities are the polity of the kingdom.

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A long term upon a mortgage fit to be kept a foot to protect the inheritance, and wait upon it.

Now let us see, and a little consider, what those rules are, and how they are applicable to this case; in both cases a term may be limited for life to one, with remainders over, though in the bare consideration of law, an estate for life is a greater estate than a term of years; but in case of an estate-tail there can be no such thing; therefore in Burgess's case, the trust of a term is limited to A. for life, the remainder to his wife for life, the remainder to the first, second, and other sons successively, and the

issue of their bodies : and for default of such issue, to the daughters of A. and their issue, the remainder to the right heirs of A. A. had no son at that time living, nor after ; but the remainder over was to the daughter of A. in being. It was strongly urged, that the daughter should have the trust vested in her, and that the trust for the daughter should close with the estate for life till A. should have a son. But because there was a limitation to the first son of A. and the issue of his body, and the remainder of the daughter was but to take place, after that son died without issue, and so the others, though it was not to a son then in being. But his estate was in contingencies which did never happen, yet the court did not allow of any such thing, as any remainder that the daughter should have, but made a decree for the execution of the devise ; so that it is clear, there can be no direct remainder of the trust of a term upon an estate-tail.

Where there can be no direct remainder, there can be no contingent remainder, denied infra.

The question then is, whether there can be any contingent remainder for this, for this case depends upon that consideration ; i. e. it is limited upon a contingency, if such a thing should happen in the life of a man, and so it is a springing trust and good that way. My Lord, I take it in this case, where there can be no direct remainder, there can be no contingent remainder, though it happen never so soon : therefore, if a term be limited to one and his heirs of his body, and he die without issue of his body within two years, the remainder over, there can be no such remainder limited at all, and therefore no contingent remainder ; for this remainder is limited at the end of an entail, and that is so remote a consideration, that as the law will not suffer a direct remainder upon it, so upon a contingency neither.

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A man's dying without heirs, in the intention of the law, on contingency an estate for life is of longer duration, in judgment of law, than a term for years.

Now in this case there is only this difference, if the estate-tail in this term had been limited to my Lord *Maltravers*, as 'tis here to Henry Howard and the heirs of his body ; and if he die without issue in the life of Henry, &c. then the remainder over, then it had been clear the contingency had been limited upon the expiring of the entail ; and though it be said that it expires within the compass of the life of a man, yet that helps not in this case at all, as I conceive ; for I will put a case upon a fee-simple (upon Pell and Brown's case.) A man limits an estate in fee-simple to a man and his heirs, and if he die without heirs during the life of J. S. then to J. D. this is void, and the lord shall have it by escheat. and that (though it be brought within the compass of the life of a man) shall never be a good limitation : and if that case of Pell and Brown had been, that a man devised land to a man and his heirs, whereby it would appear, that it was intended the devisee should have had a fee-simple, with the remainder over upon a contingency ; I take it, this could not be good by way of executory devise, because a man's dying without heirs, which to lose his fee-simple he must do, comes not under the intention of the law as of a contingency. An estate for life, in the judgment of the law, is of longer duration than a term for years ; and the rule in Child and Bailly's case is firm, that the expiring of the limitation of a term in tail without the life of a man, will not make good a limitation of the remainder over, which I hold to

be a good rule, and the reason of it, I conceive, will reach to this case : for what is the difference ? here is a contingency indeed : but it is to have an estate-tail expire within one life, which I take to be the same case. Suppose the term had been limited to Henry and the heirs male of his body, so long as Thomas shall have heirs male of his body, that would sure have cut off the remainder ; and what is the difference ? for it doth depend upon Thomas dying without issue, whereby the earldom should descend, then when it is limited to Henry and the heirs male of his body. And if Thomas die without issue in the life of Henry, then over, this can no more abridge it, than if he had said, if Henry die without issue during the life of another man.

So that I think, the whole term is swallowed in the estate-tail upon this consideration, and there can be no remainder of it, no executory devise, nor any springing trust to Charles upon this contingency ; and, my lord, upon that reason, I think this settlement fails, and is disappointed as to the younger brothers.

If it had been limited to Henry for life only, and no further, then let the contingency have been what it would, that were to happen in his life, if complicated with several ascendants, yet it should be stood in remainder, because the law doth allow a remainder directly upon an estate for life ; and so it would also in contingency if that were to happen during the continuance of the particular estate : but I take this to be a step further than any of our resolutions in law have gone yet, and therefore I cannot see reason to extend the exposition any further ; but am of opinion it fails in point of limitation, and ought to be decreed for the defendant.

The law allows a remainder directly upon an estate for life, not so on a contingency, unless it be to happen during the continuance of the particular estate.

The Lord Chief Justice Pemberton's Opinion.

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I need not trouble your Lordship with opening the case ; the truth is, it is in short no more than this : my Lord Duke of Norfolk's father, the earl of Arundel, having created an estate for 200 years, and settled the inheritance by one deed in tail to himself for life ; and after to his lady for life : and then to his son, and the heirs male of his body ; and for default of such issue to the other son Charles, and the heirs male of his body, with several remainders over. Then by another deed, he does declare the trusts of this term of 100 years, which being to Henry and the heirs male of his body, till my Lord *Maltravers* die without issue male, and the earldom descend to my now Lord Duke ; and after the determination of that estate, if he shall die without issue male, then to come to Charles and the heirs male of his body, whether this be a good remainder to Charles is the question. For as to any thing of the recovery or the assignment, I shall put it quite out of the case, and do not think it will have any influence upon the case as it lies before us. And indeed I do first think that the Earl of Arundel did certainly design, that if my Lord *Maltravers* should die without issue male, whereby the honour of the family should come to my Lord Duke that now is, Charles should have this estate ; and his intentions are manifest by creating this term, which could be of no other use but to carry over this estate to

How this case
might have
been made
good.

Terms in gross
cannot be li-
mited in re-
mainder *secus*,
terms that at-
tend an inhe-
ritance.

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The Diversity
as to this case.

Charles a younger son, upon the elder son's dying without issue. And I do think truly that this was but a reasonable intention of the father; for there being to come with the earldom a great estate that would so well support it, it was reason, and the younger sons might expect it, that their fortunes might be somewhat advanced by their father in case it should so happen. It was a reasonable expectation in them; and truly I think it was the plain intention of the earl. And there is no great question but it might have been made good and effectual by the limitation of two terms; for if one term had been limited to determine upon the death of Thomas without issue, and that to be for the now Duke of Norfolk, and another term then to commence and go over to Charles, that would certainly have been good, and carried the estate to Charles upon that contingency; but as this case now is, I do think that this way that is now taken is not a good nor a right way; for I take this limitation to Charles to be void in law. And as to that, I know there is a famous difference of limiting terms that are in gross, and terms that attend the inheritance. As to terms that are in gross, I think it will be granted (because it hath been settled so often) they are not capable of limitation to one after the death of one without issue; for so are all the cases that have been cited. I think further, it is as clear, that upon terms attendant upon an inheritance, there may be such a limitation, to wit, that a term that waits upon an inheritance after the death of one without issue, may go over to another: but then it is capable of such a limitation in that case, with this restriction; that is, if the inheritance be so limited; for though it be attendant ever so much upon the inheritance, yet that attendance cannot make it capable of another limitation than that inheritance is capable of: for if I have an estate in fee-simple, and have the trust of a term attendant upon that, and I will let the estate of inheritance descend to my son, I cannot in this case (though the term be attendant) limit it, that if my son die without issue, that term shall go over; it is not capable of any foreign limitation whatsoever; for as to that, it is a term in gross, it hath not the quality of a term attendant upon the inheritance at all; for first, it would fail of an inheritance, and a free-hold to support it, and further than a term can be supported with a like estate of inheritance; it will fail to be a term attendant upon the inheritance. Now, here the estate of inheritance is limited to Henry and the heirs male of his body, with remainders to Charles and the heirs male of his body. Now thus the term is capable of a limitation to Henry and the heirs male of his body: and for want of such issue, to Charles and the heirs male of his body; because it hath an inheritance, on which it depends, to go along with it and support it. But to take this out of its right course and channel, and put another limitation upon it: that upon the dying of Thomas without issue, whereby the earldom shall descend, this shall go over to Charles; alas it cannot be, because it hath no free-hold or inheritance to support it.

And then besides, it could not have that reason that the law intends for its permitting such limitations to terms attending the inheritance; for I take it, the reason why terms are admitted to

be attendant upon the inheritance, and to be capable of limitations to go along with the inheritance, is the relation they have to the inheritance; and because it is for the benefit of the inheritance, and that I conceive was the only reason that at first guided these judgments of the court of chancery, that these terms should be admitted to wait upon the inheritance to protect it; when mortgages were made in former times by feoffments, upon condition of payment of money, we hear of none of these terms. But in the latter part of Queen Elizabeth's time, and since, the way of limiting terms in mortgages came up in use, and then upon the buying of inheritances came in the trust of these terms; and they that purchased were advised to keep those terms on foot, to protect their purchased inheritance.

I must look upon this indeed as a new case of novel invention; for in truth I think it is *primæ impressionis*, and none of the former cases have been exactly the same: for this term here does partake somewhat of a term in gross, and somewhat of a term attendant upon an inheritance; and if there should be such a limitation admitted, such a foreign limitation as this is, (I call it foreign, because it is not that which goes along with the inheritance.) If that be allowed, we know not what inventions may grow upon this; for I know men's brains are fruitful in inventions, as we may see in Matthew Manning's case. It was not foreseen nor thought, when that judgment was given, what would be the consequence when once there was an allowance of the limitation of a term after the death of a person, presently it was discerned, there was the same reason for after twenty men's lives as after one; and so then it was held and agreed, that so long as the limitation exceeded not lives in being at the creation of the estate, it should extend so far. That came to grow upon them then; and now if this be admitted, no man can foresee what an ill effect such an ill allowance might have there, might such limitations come in as would incumber estates and mightily entangle lands.

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This is certain, such an allowed limitation would add a greater check to estates than was ever made by limitations of inheritance: for when an estate of inheritance was limited to a man and his heirs male of his body, with remainders over, and a term was limited accordingly to wait upon the inheritance: in that case, he that had the first estate-tail, had full power over the term, to alienate it if he pleased; for it is not an estate within the statute *de donis*; and I doubt not that had a great influence upon the judges, when they made the difference between terms for years in gross, and terms attendant upon the inheritance. For terms in gross, they could not be alienated in such a case; but terms attending upon the inheritance, though under such limitations, the parties could alien them.

But now if this limitation in question were good, then Henry could not part with it, because it is to him and his heirs male of his body, under a collateral limitation of his brother's dying without issue, and the earldom descending to himself, and then his estate was to determine, and so it would fetter that which if it had been a term attendant, &c. would have been alienable.

I have seen the time often when they have refused to carry cases further than the precedents have been in former times ; and peradventure it would be dangerous if we should do so here ; and it seems to me to be an odd kind of estate, as this limitation makes it ; and if such a construction, as the plaintiff would have, should be made, it would bring it under a great uncertainty. To take this estate as it stands in Henry and the heirs male of his body, it is by this limitation made, and so indeed I think it is, a term that waits upon the inheritance : But if this that is contended for be admitted to be a good limitation upon the contingency of Thomas's dying without issue male, then the estate in Charles would be a term in gross, for it hath no inheritance to attend upon. Then suppose Henry had died without issue male in Charles's life time, then it is a term attendant upon the inheritance again. If Charles die in the life of Henry, it goeth to the executors. If Henry in the life of Charles, it goeth to the heirs.

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Therefore I think that this estate being limited in another way, and being it would endure a strain further than any yet has been attempted, and it being to commence upon Thomas's dying without issue male, and not attendant upon any inheritance, it is such an estate as the law cannot allow of, but void in limitation and creation ; and so I take it the plaintiff's bill ought to be dismissed.

The Lord Chancellor Nottingham's Arguments.

THE FIRST ARGUMENT.

This is the case. The plaintiff, by his bill, demands the benefit of a term for two hundred years, in the barony of Grostock, upon these settlements.

Henry Frederick, late earl of Arundel and Surrey, father of the plaintiff and defendant, had issue, Thomas, Henry, Charles, Edward, Francis and Bernard ; and a daughter, the lady Katharine : Thomas Lord Maltravers, his eldest son, was *non compos mentis*, and care is taken to settle the estate and family, as well as the present circumstances will admit. And thereupon there are two indentures drawn, and they are both of the same date. The one is an indenture between the earl of Arundel of the one part : and the Duke of Richmond, the Marquis of Dorchester, Edward Lord Howard of Eastercricke, and Sir Thomas Hatton of the other part : it bears date the twenty-first day of March, 1647. Whereby an estate is conveyed to them and their heirs ; to these uses : to the use of the earl for his life.

After that to the countess his wife for her life, with power to make a lease for 21 years, reserving the ancient rents.

The remainder for 200 years to those trustees, and that upon such trusts, as by another indenture, intended to bear date the same day, the earl should limit and declare ; and then the remainder of the lands are to the use of Henry, and the heirs male of his body begotten, with the remainders in tail to Charles, Edward, and the other brothers successively.

Then comes the other indenture, which was to declare the trust of the term for 200 years, for which all these preparations are made, and that declares that it was intended this term should attend the inheritance, and that the profits of the said barony, &c. should be received by the said Henry Howard, and the heirs male of his body, so long as Thomas had any issue male of his body should live, (which was consequently only during his own life, because he was never likely to marry) and if he die without issue in the life-time of Henry, not leaving a wife *privement en-sient* of a son, or if after his death, the dignity of earl of Arundel should descend upon Henry; then Henry or his issue should have no farther benefit or profit of the term of 200 years. Who then shall? But the benefit shall redound to the younger brothers in manner following. How is that? To Charles and the heirs male of his body, with the like remainders in tail to the rest. Thus is the matter settled by these indentures; how this family was to be provided for, and the whole estate governed for the time to come.

These indentures are both sealed and delivered in the presence of Sir Orlando Bridgman, Mr. Edward Alehorn, and Mr. John Alehorn, both of them my Lord Keeper Bridgman's clerks; I knew them to be so.

This attestation of these deeds is a demonstration to me they were drawn by Sir Orlando Bridgman.

After this the contingency does happen: for Thomas Duke of Norfolk dies without issue, and the earldom of Arundel as well as the dukedom of Norfolk, descended to Henry now Duke of Norfolk, by Thomas his death without issue: presently upon this the Marquis of Dorchester, the surviving trustee of this estate, assigns his estate to Marriot; but he doth it upon the same trusts that he had it himself: Mr. Marriot assigns his interest frankly to my Lord Henry, the now Duke, and so has done what he can to merge and extinguish the term by the assigning it to him, who has the inheritance.

To excuse the Marquis of Dorchester from co-operating in this matter, it is said, there was an absolute necessity so to do; because the tenants in the north would not be brought to renew their estates, while so aged a person did continue in the seignior, for fear, if he should die quickly, they should be compelled to pay a new fine. But nothing in the world can excuse Marriot from being guilty of a most wilful and palpable breach of trust, if Charles have any right to this term: so that the whole contention in the case is, to make the estate limited to Charles void; void in the original creation; if not so, void by the common recovery suffered by the now duke, and the assignment of Marriot. If the estate be originally void, which is limited to Charles, there is no harm done; but if it only be avoided by the assignment of Marriot, with the concurrence of the Duke of Norfolk, he having notice of the trusts, then most certainly they must make it good to Charles in equity, for a palpable breach of trust, of which they had notice. So that the question is reduced to this main single point, whether all this care that was taken to settle this estate and

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The main point.

family, be void and insignificant; and all this provision made for Charles and the younger children to have no effect?

I am in a very great strait in this case: I am assisted by as good advice, as I know how to repose myself upon, and I have the fairest opportunity, if I concur with them, and so should mistake, to excuse myself, that I did *errare cum patribus*; but I dare not at any time deliver any opinion in this place, without I concur with myself and my conscience too.

I desire to be heard in this case with great benignity, and with great excuse for what I say, for I take this question to be of so universal a concernment to all men's rights and properties, in point of disposing of their estates, as to most conveyances, made and settled in the late times and yet on foot, that being afraid I might shake more settlements than I am willing to do, I am not disposed to keep so closely and strictly to the rules of law as the judges of the common-law do, as not to look to the reasons and consequences that may follow upon the determination of this case.

I cannot say in this case, that this limitation is void, and because this is a point, that in courts of equity (which are not favoured by the judgments of the courts of law) is seldom debated with any great industry at the bar; but where they are possessed once of the cause, they press for a decree, according to the usual and known rules of law; and think we are not to examine things. And because it is probable this cause, be it adjudged one way or other, may come into the parliament, I will take a little pains to open the case, the consequences that depend upon it, and the reasons that lie upon me, as thus persuaded, to suspend my opinion.

Things to be granted in this case.

Whether this limitation to Charles be void or no, is the question. Now, first, these things are plain and clear, and by taking notice of what is plain and clear, we shall come to see what is doubtful.

1. That the term in question, though it were attendant upon the inheritance, at first, yet upon the happening of the contingency, it is become a term in gross to Charles.

2. That the trust of a term in gross can be limited no otherwise in equity, than the estate of a term in gross can be limited in law: for I am not setting up a rule of property in chancery, other than that which is the rule of property at law.

3. It is clear, that the legal estate of a term for years, whether it be a long or a short term, cannot be limited to any man in tail, with the remainder over to another after his death without issue; that is flat and plain, for that is a direct perpetuity.

4. If a term be limited to a man and his issue, and if that issue die without issue, the remainder over, the issue of that issue takes no estate; and yet because the remainder over cannot take place, till the issue of that issue fail, that remainder is void too, which was *Reeve's* case; and the reason is, because that looks towards a perpetuity.

5. If a term be limited to a man for life, and after to his first, second, third, &c. and other sons in tail successively, and for de-

fault of such issue the remainder over, though the contingency never happen, yet that remainder is void, though there were never a son then born to him; for that looks like a perpetuity, and this was Sir William Backhurst his case in the 16 of this king.

Modern Reports, 115.

6. Yet one step further than this, and that is *Burgiss's* case. A term is limited to one for life, with contingent remainders to his sons in tail, with remainder over to his daughter, though he had no son; yet because it is foreign and distant to expect a remainder after the death of a son to be born without issue, that having a prospect of a perpetuity, also was adjudged to be void.

Modern Reports, 115.

These things having been settled, and by these rules has this court always governed itself: but one step more there is in this case.

7. If a term be devised, or the trust of a term limited to one for life, with twenty remainders for life, successively, and all the persons *in esse*, and alive at the time of the limitation of their estates, these though they look like a possibility upon a possibility, are all good, because they produce no inconvenience, they wear out in a little time with an easy interpretation, and so was *Alford's* case. I will yet go farther.

8. In the case cited by Mr. *Holt*, *Cotton* and *Heath's* case, a term is devised to one for 18 years, after to C. his eldest son for life, and then to the eldest issue male of C. for life, though C. had not any issue male at the time of the devise, or death of the deviser, but before the death of C. it was resolved by Mr. Justice *Jones*, Mr. Justice *Crook*, and Mr. Justice *Berkley*, to whom it was referred by the Lord Keeper *Coventry*, that it only being a contingency upon a life that would speedily be worn out, it was very good; for that there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself; but the contrary rule given as a reason by my Lord *Popham* in the rector of *Chedington's* case, looks like a reason of art; but, in truth, has no kind of reason in it, and I have known that rule often denied in Westminster Hall. In truth, every executory devise is so, and you will find that rule not to be allowed in *Blanford* and *Blanford's* case, 13 Jac. I. part of my Lord *Rolls*, 318. where he says, if that rule take place, it will shake several common assurances: and he cites *Paramour's* and *Yardley's* case in the commentaries where it was adjudged a good devise, though it were a possibility upon a possibility.

Roll. Abr. tit. devise, 612.

A possibility upon a possibility and contingency upon a contingency may be. Co. 1. 156.

These conclusions, which I have thus laid down, are but preliminaries to the main debate. It is now fit we should come to speak to the main question of the case, as it stands upon its own reason, distinguished from the reasons of these preliminaries; and so the case is this.

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The trust of a term for two hundred years is limited to Henry in tail, provided if Thomas die without issue in the life of Henry, so that the earldom shall descend upon Henry, then go to Charles in tail; and whether this be a good limitation to Charles in tail, is the question; for most certainly it is a void limitation to Edward in tail, and a void limitation to the other brothers in tail: but

The direct question.

Co. 10. 87.

whether it be good to Charles is the doubt, who is the first taker of this term in gross ; for so it is (I take it) now become, and I do, under favour, differ from my Lord Chief Justice in that point ; for, if Charles die, it will not return to Henry ; for that is my Lord Coke's error in *Leonard Loveis's* case ; for he says, that if a term be devised to one and the heirs male of his body, it shall go to him or his executors, no longer than he has heirs male of his body ; but it was resolved otherwise in *Leventhorp's* and *Ashby's* case, 11 Car. B. R. *Rolls's* adjudgment, title devise, fol. 611. for these words are not the limitation of the time, but an absolute disposition of the term.

But now let us, I say, consider whether this limitation be good to Charles or no. It hath been said,

Object. 1. It is not good by any means ; for it is a possibility upon a possibility.

Answ. That is a weak reason, and there is nothing of argument in it, for there never was yet any devise of a term with remainder over, but did amount to a possibility upon a possibility, and executory remainders will make it so.

Co. 6. Rep. 46.

Obj. 2. Another thing was said, it is void, because it doth not determine the whole estate, and so they compare it to Sir *Anthony Mildmay's* case, where it is laid down as a rule, that every limitation or condition ought to defeat the entire estate, and not to defeat part and leave part not defeated ; and it cannot make an estate to cease as to one person, and not as to the other. But,

Answ. I do not think, that any case or rule was ever worse applied than that to this ; for if you do observe this case, here is no *proviso* at all annexed to the legal estate of the term, but to the equitable estate, that is built upon the legal estate, unto the estate to Henry, and the heirs male of his body, to attend the inheritance with a *proviso* if Thomas die without issue in Henry's life, and the earldom come to Henry, then to Charles : which doth determine the estate to Henry, and his issue ; but the other estate given to Charles doth arise upon this *proviso*, which makes it an absurdity to say, that the same *proviso*, upon which the estate ariseth, should determine that estate too.

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Obj. 3. The great matter objected is, it is against all the rules of law, and tends to a perpetuity.

Answ. If it tends to a perpetuity, there needs no more to be said, for the law has so long laboured against perpetuities, that it is an undeniable reason against any settlement, if it can be found to tend to a perpetuity.

Therefore let us examine whether it do so, and let us see what a perpetuity is, and whether any rule of law is broken in this case.

A perpetuity,
what.

A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate : such do fight against God, for they pretend to such a stability in human affairs, as the nature of them

Why not to be
endured.

admits not of, and they are against the reason and the policy of the law, and therefore not to be endured.

But on the other side, future interests, springing trusts, or trusts executory, remainders that are to emerge and arise upon contingencies, are quite out of the rules and reasons of perpetuities, nay, out of the reason upon which the policy of the law is founded in those cases, especially, if they be not of remote or long consideration; but such as by a natural and easy interpretation will speedily wear out, and so things come to their right channel again.

Let us examine the rule with respect to freehold-estates, and see whether there it will amount to the same issue.

There is not in the law a clearer rule than this, that there can be no remainders limited after a fee-simple, so is the express book-case, 29 Hen. VIII. 33. in my Lord *Dyer*; but yet the nature of things, and the necessity of commerce between man and man, have found a way to pass by that rule, and that is thus; either by way of use, or by way of devise: therefore if a devise be to a man and his heirs, and if he die without issue in the life of B. then to B. and his heirs: this is a fee-simple upon a fee-simple, and yet it has been held to be good.

My Lord Chief Baron did seem to think, that this resolution did take its original from *Pell's* and *Brown's* case; but it did not so, the law was settled before; you may find it expressly resolved 19 Eliz. in a case between *Hynde* and *Lyon*, 3. Leonard. Which, of the books that have lately come out, is one of the best; and it was there adjudged to be so good a limitation, that the heir who pleaded *riens per descent* was forced to pay the debt, and it had the concurrence of a judgment in 38 Eliz. grounded upon the reason of *Wellock* and *Hammond's* case, cited in *Beraston's* case, where it is said, Crook, Eliz. 204. in a devise it may well be, that an estate in fee shall cease in one, and be transferred to another: all this was before *Pell's* and *Brown's* case, which was in 18 Jac. It is true, it was made a question afterwards in the serjeant's case; but what then? We all know that to be no rule to judge by; for what is used to exercise the wits of the serjeants, is not a governing opinion to decide the law. It was also adjudged in Hil. 1649, when my Lord *Rolls* was Chief Justice, and again in Mich. 1650, and after that indeed in 1651. it was resolved otherwise in *Jay* and *Jay's* case, but it has been often agreed that where it is within the compass of one life, that the contingency is to happen, there is no danger of a perpetuity. And I oppose it to that rule which was taken by one of the Lords and Judges, that where no remainders can be limited, no contingent remainders can be limited, which I utterly deny, for there can be no remainder limited after a fee simple, yet there may a contingent fee-simple arise out of the first fee, as hath been shown.

Thus it is agreed to be by all sides in the case of an inheritance; but now say they, a lease for years, which is a chattel, will not bear a contingent limitation in regard of the poverty and meanness of a chattel-estate. Now as to this point, the difference between a chattel and an inheritance is a difference only in words, but not in substance, nor in reason, or the nature of the thing;

Remainders that arise upon contingencies out of the rules of perpetuities.

No remainder can be limited after a fee-simple yet by way of use, or by way of devise it hath been done.

Cro. Mich. 18 Jac. 590.
3 Leonard. 64.

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No remainder can be limited after a fee-simple, yet a contingent fee simple may rise out of the first fee.

for the owner of a lease has as absolute a power over his lease as he that hath an inheritance has over that. And therefore where no perpetuity is introduced, nor any inconveniency doth appear, there no rule of law is broken.

Reasons that support the springing trust of a term, as well as the springing use of an inheritance.

The reasons that do support the springing trust of a term as well as the springing use of an inheritance, are these.

Leases settled on marriage.

1. Because it hath happened sometimes, and doth frequently, that men have no estates at all, but what consist in leases for years; now it were not only very severe, but (under favour) very absurd, to say that he who has no other estate but what consists in leases for years, shall be incapable to provide for the contingencies of his own family, though these are directly within his view and immediate prospect. And yet if that be the rule, so it must be; for I will put the case; a man who has no other estate but leases for years, chattels real, treats for the marriage of his son and thereupon it comes to this agreement: these leases shall be settled as a jointure for the wife, and provision for the children: says he, I am content, but how shall it be done? Why thus: you shall assign all these terms to *John a Styles*, in trust for yourself and your executors, if the marriage take no effect; but then, if it takes effect, to your son while he lives, to his wife after while she lives, with remainders over. I would have any one tell me whether this were a void limitation upon a marriage settlement; or if it be, what a strange absurdity is it, that a man shall settle it if the marriage take no effect, and shall not settle it if the marriage happen.

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2. Suppose the estate had been limited to Henry Howard and the heirs male of his body, till the death of Thomas without issue, then to Charles, there it had been a void limitation to Charles: if then the addition of those words, if Thomas die without issue in the life of Henry, &c. have not mended the matter, then all that addition of words goes for nothing, which it is unreasonable and absurd to think it should.

3. Another thing there is, which I take to be unanswerable, and gather it from what fell from my Lord Chief Justice *Pemberton*; and when I can answer that case, I shall be able to answer myself very much for that which I am doing. Suppose the proviso had been thus penned, and if Thomas die without issue male, living Henry, so that the earldom of Arundel descend upon Henry, then the term of 200 years limited to him and his issue, shall utterly cease and determine, but then a new term of 200 years shall arise and be limited to the same trustees, for the benefit of Charles in tail. This he thinks might have been well enough, and attained the end and intention of the family, because then this would not be a remainder in tail upon a tail, but a new term created.

True reason the same all over the world. Chicaneries of law, ridiculous.

Pray let us so resolve cases here, that they may stand with the reason of mankind, when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides? I would fain know the difference, why I may not raise a new springing trust upon the same term, as well as a new springing term upon the same trust; that is such a chicanery of law as will be laughed at all over the christian world.

4. Another reason I go on is this ; that the meanness of the consideration of a term for years, and of a chattel-interest, is not to be regarded : for whereas this will be no reason any where else ; so I shall show you, that this reason, as to the remainder of a chattel-interest, is a reason that has been exploded out of Westminster-Hall. There was a time indeed that this reason did so far prevail, that all the judges in the time of my Lord Chancellor *Rich*, did 6 *Edvardi VI.* deliver their opinions, that if a term for years be devised to one, provided that if the devisee die, living J. S. then to go to J. S. that remainder to J. S. is absolutely void, because such a chattel-interest of a term for years is less than a term for life, and the law will endure no limitation over. Now this being a reason against sense and nature, the world was not long governed by it, but in 10 *Eliz.* in *Dyer*, they began to hold the remainder was good by devise ; and so 15 *Eliz.* seems to, and 19 *Eliz.* it was by the judges held to be good remainder ; and that was the first time that an executory remainder of a term was held to be good. When the chancery did begin to see that the judges of the law did govern themselves by the reason of the thing, this court followed their opinion, the better to fix them in it, they allowed of bills by the remainder-man, to compel the devisee of the particular estate, to put in security that he in remainder should enjoy it according to the limitation. And for a great while so the practice stood, as they thought it might well, because of the resolution of the judges, as we have shewn ; but after this was seen to multiply the chancery suits, then they began to resolve that there was no need of that way, but the executory remainder man should enjoy it, and the devisee of the particular estate should have no power to bar it. Men began to presume upon the judges then, and thought if it were good as to remainders after estates for lives, it would be good also as to remainders upon estates-tail : that the judges would not endure, and that is so fixed a resolution, that no court of law or equity ever attempted to vreak in the world. Now then come we to this case, and if so be where it does not tend to a perpetuity, a chattel-interest will bear a remainder over, upon the same reason it will bear a remainder over upon a contingency, where that contingency doth wear out within the compass of a life, otherwise, it is only to say, it shall not, because it shall not : for there is no more inconveniences in the one than in the other.

Come we then, at last, to that which seems most to choke the plaintiff's title to this term, and that is the resolution in *Child* and *Bayly's* case ; for it is upon that judgment, it seems, all conveyances must stand or be shaken, and our decrees made. Now therefore I will take the liberty to see what that case is, and how the opinion of it ought to prevail in our case.

1. If *Child* and *Bayly's* case be no more than as it is reported by *Rolls*, part 2d, fol. 119. then it is nothing to the purpose : a devise of a term to Dorothy for life, the remainder to William, and if he dies without issue, to Thomas, without saying, in the life of Thomas ; and so it is within the common rule of a limitation of a term in tail, with remainder over, which cannot be good.

But if it be as Justice *Jones* has reported it, fol. 15, then it is as

Remainder of a chattel interest, how it grew up and increased in time.
Dyer, fol. 74.

Dyer, f. 277.

Dyer, f. 328.

Dyer, f. 358.

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far as it can go, an authority ; for it is there said to be, living Thomas. But the case, under favor, is not altogether as Mr. Justice *Jones* hath reported it neither ; for I have seen a copy of the record upon this account ; and, by the way, no book of law is so ill corrected, or so ill printed as that.

Cro. Hil 15.
Jac. 459.

The true case is, as it is reported by Mr. Justice *Crook* ; and with Mr. Justice *Crook's* report of it, doth my Lord *Rolls* agree, in his abridgement, title devise, 612. There it is, a term of 76 years is devised to Dorothy for life, then to William and his assigns all the rest of the term, provided if William die without issue then living, then to Thomas ; and this is in effect our present case ; I agree it. But that which I have to say to this case is,

First, it must be observed, that the resolution there did go upon several reasons, which are not to be found in this case.

1. One reason was touched upon by my Lord Chief Baron, that William having the term to him and his assigns, there could be no remainder over to Thomas, of which words there is no notice taken by Mr. Justice *Jones*.

2. Dorothy the devisee for life, was executrix, and did assent and grant the lease to William, both which reasons my Lord *Rolls* doth lay hold upon, as material, to govern the case.

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3. William might have assigned his interest, and then no remainder could take place, for the term was gone.

4. He might have had issue, and that issue might have assigned, and then it had put all out of doubt.

5. But the main reason of all, which makes me oppose it, ariseth out of the record, and is not taken notice of in either of the reports of *Rolls*, or *Jones*, or in *Roll's* abridgment. The record of that case goes farther, for the record says : there was a farther limitation upon the death of Thomas without issue to go to the daughter, which was a plain affectation of a perpetuity to multiply contingencies. It further appears by the record, that the father's will was made the 10 of Eliz. Dorothy, the devisee for life, held it to the 24, and then she granted and assigned the term to William ; he under that grant held it till the 31 of Eliz. and then regranted it to his mother, and died ; the mother held it till the 1 of R. James, and then she died ; the assignees of the mother held it till 14 Jac. and then, and not till then, did Thomas, the younger son, set up a title to that estate ; and before that time it appears by the record, there had been six several alienations of the term to purchasers, for a valuable consideration, and the term renewed for a valuable fine paid to the Lord. And do we wonder now, that after so long an acquiescence as from 10 Eliz. to 14 Jac. and after such successive assignments and transactions, that the judges began to lie hard upon Thomas, as to his interest in law, in the term, especially when the reasons given in the reports of the case, were legal inducements to guide their judgments, of which there are none in our case ? But then,

Secondly, at last, allowing this case to be as full and direct an authority as is possible, and as they would wish, that rely upon it ; then I say—

1. The resolution in *Child and Bayly's* case, is a resolution that never had any resolution like it before nor since.

2. It is a resolution contradicted by some resolutions ; and to show, that the resolution has been contradicted, there is—

1. The case of *Cotton and Heath*, which looks very like a contrary resolution ; there is a term limited to A. for eighteen years, the remainder to B. for life, the remainder to the first issue of B. for life, this contingent upon a contingent was allowed to be good, because it would wear out in a short time. But

Rel. Abr. Ti
Devise, 612.

2. To come up more fully and closely to it, and show you, that I am bound by the resolutions of this court, there was a fuller and flatter case 21 Car. 2. in July 1669, between Wood and Saunders. The trust of a long lease is limited and declared thus : to the father for sixty years if he lived so long ; then to the mother for sixty years, if she lived so long ; then to John and his executors if he survived his father and mother ; and if he died in their life-time, having issue, then to his issue ; but if he die without issue, living the father or mother, then the remainder to Edward in tail. John did die without issue, in the life-time of the father and mother, and the question was, whether Edward should take this remainder after their death ? and it was resolved by my Lord Keeper Bridgeman, being assisted by Judge Twisden and Judge Rainsford, that the remainder to Edward was good, for the whole term had vested in John. if he had survived ; yet the contingency never happening, and so wearing out in the compass of two lives in being, the remainder over to Edward might well be limited upon it.

Cases in
Chancery
1 Part, 131.

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Thus we see, that the same opinion which Sir Orlando Bridgeman held when he was a practiser, and drew these conveyances, upon which the question now ariseth, remained with him when he was the judge in this court, and kept the seals ; and by the way, I think it is due to the memory of so great a man, whenever we speak of him, to mention him with great reverence and veneration for his learning and integrity.

Object. They will perhaps say, where will you stop if not at *Child and Bayly's* case ?

Ans. Where ? why every where, where there is not any inconvenience, any danger of a perpetuity ; and whenever you stop at the limitation of a fee upon a fee, there we will stop in the limitation of a term of years. No man ever yet said, a devise to a man and his heirs, and if he die without issue, living B. then to B. is a naughty remainder, that is *Pell's* and *Brown's* case.

Now the *ultimum quod sit*, or the utmost limitation of a fee upon a fee, is not yet plainly determined, but it will be soon found out, if men shall set their wits on work to contrive by contingencies, to do that which the law has so long laboured against, the thing will make itself evident, where it is inconvenient, and God forbid, but that mischief should be obviated and prevented.

I have done with the legal reasons of the case : it is fit for us here a little to observe the equitable reasons of it ; and I think this deed is good both in law and equity ; and the equity in this

The equitable
reasons of this
case.

case is much stronger, and ought to sway a man very much to incline to the making good this settlement if he can. For,

1 It was prudence in the earl to take care, that when the honour descended upon Henry, a little better support should be given to Charles, who was the next man, and trod upon the heels of the inheritance.

2. Though it was always uncertain whether Thomas would die without issue, living Henry, yet it was morally certain that he would die without issue, and so the estate and honour come to the younger son: for it was with a careful circumspection always provided, that he should not marry till he should recover himself into such estate of body and mind, as might suit with the honour and dignity of the family.

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3. It is a very hard thing for a son to tell his father, that the provision he has made for his younger brothers is void in law, but it is much harder for him to tell him so in chancery. And if such a provision be void, it had need be void with a vengeance; it had need be so clearly void, that it ought to be a prodigy if it be not submitted to.

Now where there is a perpetuity introduced, no cloud hanging over the estate but during a life, which is a common possibility where there is no inconvenience in the earth, and where the authorities of this court concur to make it good; to say, all is void, and to say it here, I declare it, I know not how to do it. To run so counter to the judgment of that great man, my lord keeper Bridgeman, who hath advised this settlement; and when he was upon his oath in this place decreed it good. I confess his authority is too hard for me to resist, though I am assisted by such learned and able judges, and will pay as great a deference to their opinions as any man in the world shall.

If then this should not be void, there is no need for the merger by the assignment or the recovery to be considered in the case: for if so be this be a void limitation of the trust, and they who had notice of it, will palpably break it, they are bound by the rules of equity to make it good by making some reparation. Nay, which is more, if the heir enter upon the estate to defeat the trust, that very estate doth remain in equity infected with the trust; which was the case of my lord of Thomond; so also was the resolution in Jackson and Jackson's case: so that to me the right appears clear, and the remedy seems to be difficult.

Lord Chancellor's opinion.

Therefore my present thoughts are, that the trust of this term was well limited to Charles, who ought to have the trust of the whole term decreed to him, and an account of the mean profits, for the time by-past, and a recompense made to him from the Duke and Marriot for the time to come. But I do not pay so little reverence to the company I am in, as to run down their solemn arguments and opinions upon my present sentiments; and therefore I do suspend the enrolment of any decree in this case, as yet: but I will give myself some time to consider, before I take any final resolution, seeing the lords the judges do differ from me in their opinions.

DE TERMINO PASCH.

Anno. 34 Car. II. Ro. In Cancell. Sabbati 13 die Maii.

Howard versus le Duc de Norfolk.

This day was appointed for final judgment in this cause, and it being called,

Mr. Serjeant M. moved: My Lord, we depend upon your lordship in that cause for your opinion.

Mr. S. G. My Lord, in the case of Howard against the Duke of Norfolk, I do not know whether I may have the liberty to move this that I am going to offer. It stands now in the paper now for your Lordship's judgment, and therefore I speak this that I now offer with great submission, if your Lordship will please to hear it. If you will please to allow my Lord of Arundel's counsel the liberty of offering any thing further in the cause, possibly it will not become them to offer any thing that hath been said, but if they may be permitted to argue some new matter if they can find any. Therefore, we that are for my Lord of Arundel, desire the liberty of having some little time till Mr. Keck (who is of my Lord's counsel, but at present indisposed, and has not yet been heard) can come, which we hope will not be long. We hope it will be no prejudice to this cause, which has had so long agitation, to stay a few days longer. A week's time sure will break no squares.

Lord Chancellor. I did appoint the first Tuesday in the term to deliver my opinion in this case, for I desire to rid my hands of it. But Mr. Keck, who was then at the bar, did pray that he might argue it once more for the defendant, and my Lord Duke of Norfolk having never been heard by Mr. Keck, I was willing to hear him. For it was a cause of moment and difference of opinions, and there are so many short-hand writers, that nothing can pass from us here, but it is presently made public; and though a man doth not speak in print, yet what he says shall be immediately put in print; therefore, because Mr. Keck desired it, and to justify my own opinion, though I had appointed the first Tuesday in the term, yet I gave till this day. It is but reason Mr. Keck should be heard, who has not yet argued it; and if any man can convince me I am in an error, or make it appear to me, that I am mistaken in the law in the opinion I have given, which as yet I see no cause in the world to change, God forbid, but I should hear them; but on the other side, this cause must not everlastingly be put off, because my Lord Duke's counsel are not here. Therefore I will give you a week's time further; but upon this day sevensnight, come or not come, I will give my judgment in the cause.

Mr. Serj. M. If your Lordship pleases to put it upon the other side, unless they show cause, then the opinion your Lordship has given to stand.

Lord Chancellor. If my opinion (which is under the prejudice of being contrary to that of the three chief judges) can be

refuted, I am not ashamed to retract any error I may be convinced of, but truly at present I see no colour to retract it.

Mr. Serj. M. We pray then, my Lord, that we may have this right done for us, who are for Mr. Howard the plaintiff, that they on the other side will let us know what particular points we must go upon; for if they come at large, we may not perhaps be so well provided to answer them.

Lord Chancellor. I suppose they can say nothing to any point, but that which is the main point in the case, the limitation of the remainder of a springing trust after the entail of a term, that is to determine upon a contingency that expired in the time of a life; a point which was never argued for Mr. Howard at the bar, nor stirred by the counsel

Mr. Serj. M. I hope we for Mr. Howard shall be heard to justify your Lordship's opinion.

A repetition of
the reasons.

Lord Chancellor. What hath been said here at the bench on both sides, has been taken in short-hand, and made public, I know the counsel on both sides hath seen it, or will see and look into it well, and if they can give me any reasonable satisfaction that I am in the wrong, I shall easily recede from it. But upon any thing yet offered I am of the same mind I was. As to the learned judges that assisted me at the hearing, the decree is mine, and the oath that decree is made upon is mine, theirs is but learned advice and opinion. And therefore if they can satisfy my conscience, that they are in the right and I not, well and good; if not, I must abide by that decree I have made, according to my conscience. And I will repeat this to you, I go upon these heads for my own opinion, and I would be glad any body would answer them. I say, it is against natural justice, to say that a man hath no estate but what consists in terms, shall be disabled from settling his estate, so as to provide for the contingencies in his family, that are in immediate prospect. I say it is a common case. A man that is lessee for years, assigns his term in trust for himself, until such a marriage take effect, and after to himself for life, to his wife for life, with remainder in tail to his children. Is that springing trust upon the contingency of the marriage good or not? If it be not good, then what will become of a great many marriage-settlements? if it be good, then why not in this case as well as that? And I would fain know what difference there is between the case as it is at the bar, and if it had been limited thus; if my Lord Arundel had said, that if Thomas die without issue, living Henry, then the term for two hundred years in tail should cease, and a new term should arise upon the same trust for Charles, that it seems had been enough; is there any sense in the world that can lead a reasonable man to conclude why there should be a new springing term upon the same trust. I cannot see any reason to run this case down upon the single authority of Child and Baily's case, which was such a resolution, as never had its like before, nor since, but contradicted by several resolutions as have been cited, particularly Wood and Saunder's case in this court in my Lord Bridgeman's time. These are the grounds my present apprehensions go upon; but I will hear Mr. Keck, if it may be in any

reasonable time, and give the respect to the Duke of Norfolk, that he shall not be surprised, though withal, I must do Mr. Howard the justice that he be not eternally delayed.

Then the day sevensnight was appointed ; but upon the continuance of Mr. Keck's illness, it was put peremptorily for judgment on the first Saturday in the next term.

DE TERM. TRIN.

Anno Reg. Car. II. 34. in Cancell.

Howard versus le Duc de Norfolk.

Sabbati 17 Junii, Anno Dom. 1682.

Mr. Serj. M. My Lord, we have nothing to do in that cause but to pray your judgment.

Mr. S. G. My Lord, we were in great hopes to have had other assistances to day, but it seems we are disappointed of them : that which I shall humbly offer is but short. We are, by your lordship's favour, permitted now to offer something if we can, to answer the objections which your Lordship made, and which were the ground of your opinion. We did apprehend them to be these ; that Child and Baily's case was not the same with this case, and that the case of Wood and Saunders is the last resolution of this nature, and will rule this. We do, my lord, humbly with submission offer these reasons, why the first case is the same with this, and the other different from it. Child and Baily's case, my lord, though it doth differ in some circumstances, yet it differs in no one that doth immediately concern the limitation. For the circumstances wherein they differ was the length of the term being almost expired, the conveyances over to several purchasers, and at the end of the term the resolution taken. But though it differs in these circumstances, yet these have no influence upon the limitation, or the construction of law upon the limitation. Now the limitation is the same there as it is here, for there it is one for life, and to his son during the whole term : and if he die without issue, during the life of his father and mother, then the remainder over this remainder was adjudged void. This is the same case with ours, for in case the first remainder actually vested in William the son, for it was to him and his assigns during the whole term, and if he die without issue, living father and mother, then over. This remainder I say was adjudged void, he was actually seized of the whole interest, which being vested in him, could not be divested upon the contingent limitations over, upon his death without issue, living father and mother. It is the same in our case : the Duke of Norfolk has the interest of this estate by the limitation in tail actually vested in him, and then it cannot be divested by the rule of Child and Baily's case upon the contingency of Thomas's dying without issue in the life of Henry ;

which is during the life of the now Duke of Norfolk. And in this respect the case of Wood and Saunders is not the same. It is a limitation to the father and mother for life, and for 60 years, if they so long live, then to John the son, if living at the time of the death of father and mother, the whole term. My lord, this was not a vesting the estate in John the son, but a contingent limitation, that he should take or not. If he were living at the time of the death of father and mother, then he should take: if not, he should not take. There was no interest vested in him till the contingency happened; and so the limitations will be different. And that is the ground that is drawn up in the decretal order of the cause, because this was a contingent limitation to John, and that never happening, it is all one, as if it had never been limited, and amounts, putting the contingent limitation, which never happened, out of the case, to no more than a limitation to the father and mother for life, the remainder over, which is well enough. This is that I have to offer, and I humbly submit it to your lordship.

Mr. Serj. M. And so we do, and pray your judgment.

Mr. R. I see they are pressing for your Lordship's judgment, and I know not whether it will become me to interpose with any thing.

Lord Chancellor. Say, say, for this is a cause that deserves patience.

[42] Mr. R. No man, my Lord, can have any great encouragement to add any thing after all the arguments that have been made in this cause, or can hope to offer that which will be very material and new, but I desire to have leave to say this in short. My Lord, there be two deeds by which this settlement is made, as a provision for the second son of this family, and the younger children, and therein it doth perhaps appear, that if the bulk of the estate, and the honour should come to the second son, then the settlement of this part that is made upon the second son, was intended to come to the now plaintiff, and the younger children. This is the intention of the two deeds. By the first deed the estate of freehold and inheritance is limited in tail. By the second deed the trust is declared of the term for 200 years that is limited to Henry, and so over. And therein it differs from the case of Wood and Saunders; for the trust of the term doth vest in Henry, till the contingency happen; but in Wood and Saunder's case, there it is limited to the father and mother for 60 years, if they lived so long, then to John and his heirs male, in case he survive his father and mother, and the trust to be assigned to him accordingly; and if he die without issue in the life of the father and mother, then to Edward his brother. No man can say that ever any thing here did vest in John, for it was but limited to him after his father and mother's life, in case he survived them, but it never vested in him, and so it differs from this case. For here the trust of the term did vest in the Duke of Norfolk till the contingency did happen. And as that is the difference between the two cases, and I do apprehend it is a difference with great reason from Wood and Saunders's case, so that which I infer from it is this, that where the trust of a term is limited to a man and his

issue, and his heirs male, and that vested in him, if he die without issue, or which is much a stronger case, though the contingency be restrained within the compass of a life, or of a certain time that is to wear out in a reasonable distance, yet coming after a limitation in tail cannot carry the remainder over. For if you once admit it during one life, you must admit it during twenty lives, for the reason is the same as to twenty, as it is to one, if they be all in being, and perhaps the reason will be the same as to the twenty lives all in being, and for the life of one person more. Then if the trust of a term where it is once vested in tail, can never be well limited over, though restrained within the contingent distance of a reasonable time; this limitation to the plaintiff can never be good. My Lord, I crave leave to offer your Lordship one case or two; suppose that a term for years, or the limitation of the trust of a term for years (for I think there is the same construction made of both) be limited to J. S. and the issue of his body, and if J. S. die without issue within 100 years (for the purpose) or within twenty years, then to go over to J. N. that cannot be apprehended to be good, but void; for there is no difference between 1000 or 100 or 20 years, yet 20 years is but a reasonable time, and not more in prospect than one or ten lives. If a man limit the trust of a term, or a term itself to J. S. and the issue of his body; and if he die without issue before 21, then to go over to J. N. This is a reasonable distance of time, and yet I believe this will not be allowed to be good and well limited over. And the reason is, where once a term is limited to a man and his issue, this in a reasonable construction of law carries the whole term (for it was a good while before they gained the point of remainders after lives) and (if after it be said,) if he die without issue within 100 years, or before 21, that restriction will not help it as we think. Then where is the reason or sense that it should be otherwise, if he die without issue in the life of another person? Truly, my Lord, it is very hard to find out a true difference between the cases where the restriction is for the life of a certain person, and where it is upon a certain number of years. My Lord, I would put this case upon Wood and Saunders's case, which is the authority that is so much pressed on us. Suppose that case had been thus: to the father for 60 years, if he so long live; to the mother for 60 years, if she so long live, and then instead of that limitation to John, in case he survived his father and mother: suppose it had been to the first son of the father and mother, and the heirs of his body, and if such first son die without issue in the life-time of his father and mother, then it should go over to another person. Had it then been good? Surely no. What is the difference? Why this, it being to John, in case he survived his father and mother, nothing vested. But if it had been to the first son, and the heirs of his body, and they have a son, there it differs, for it is actually vested in him. And there the limitation over to a stranger would not be good, even admitting the case of Wood and Saunders to be uncontrollable. Another objection your

Lordship made, was about the necessary limitations of the trusts of terms by termers upon marriage-settlements to a man's self till the marriage take effect, and then to such and such uses ; and the objection is, why should it not be as good a limitation of the trust of a term, or of a term itself, as well as of an inheritance ? That will not reach our case, therefore I need not say any thing to it, whether it would be so or no. But suppose this case : there be two brothers, the eldest hath no children, the younger brother hath a son, and is a going to marry the son, but hath but a small estate to give him. The elder brother has a term for years, and has a mind to provide for the son of his younger brother, and his intended wife, and he limits the trust of his term thus ; to the use of himself, and his executors till the marriage be had ; but if he die, or provided he die before the marriage had, without issue, living his younger brother, the father of him that is to be married, then to the use of that son, and so on. We do make a great doubt, whether the limitation of the trust of the term there, would be good or not, upon the difference of Child and Baily's case, that has been so often mentioned in this cause, and was so solemnly resolved. The resolution of which case, and that also of Wood and Saunders, we submit to your Lordship's consideration. As for the intention of the parties in this settlement, we cannot but say, it was intended as a provision, that when the bulk of the estate, and the honour came to the duke, his younger brothers should have an increase of their portions. But it is as plain the intent does fail as to all the other younger children, because the construction of law will not support it. So that the intent without the rule of law to maintain it, will signify nothing.

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Mr. H. If your Lordship will please to give me leave, I think, I may offer something that has not yet been observed ; we do not trouble your Lordship or ourselves out of a presumption, that we shall so far prevail, as to alter the opinion your Lordship has delivered ; but truly my design is to offer some reasons, why I hope your Lordship will be pleased to take some further consideration of the matter. Not, but that I knew your Lordship did very seriously deliberate upon it, before you delivered your opinion, and you have been pleased to tell us the reasons you went upon, and they were two : First, upon the case of Wood and Saunders in this court ; and secondly, upon the natural reason and justice, that a man that has no other estate, but terms for years, should have a power to settle those terms, so as to provide for the contingencies of his family. That a settlement of a term upon trustees to himself, till the marriage take effect, and then over, shall be good ; this might be resembled to Pell and Brown's case, and so come within the same reason. Now my Lord, with submission, we have this to offer. This trust of this term in our case, was first to attend the inheritance, and that was an estate-tail limited : but then there is a contingency added to this trust, to this trust of the term, that if Thomas die without issue, living Henry, then to Charles, and as it hath been said already, it is very plain this entail of the term did actually vest. Then the single first question is, whether upon the contingency

happening, the death of Duke Thomas without issue, it shall devest, and a springing trust arise to the now plaintiff, Mr. Charles Howard. It is said there was a just care taken for him that was a younger son; so there was: but a like care was taken for the other five, Bernard, &c. as well as for him. Now then the case lies upon this doubt, with submission to your Lordship, whether this can enure by way of a springing trust by a new creation. We think that cannot be; for here being once an estate-tail limited in a term that was to attend an estate-tail of the inheritance, the remainder over must be void in the very creation. My Lord, I have observed, ever since I have had the honour to practice at this bar, and very many particular instances might be given, that when the judges have been upon the cases called to advise here, they would not go beyond, nor think fit that this court should, beyond the resolution in Manning's case. And they have often said, if that case were now to be adjudged, it would receive another kind of resolution. The judges gave that resolution by way of executory devise, and now I think, since that, there have been more suits in this court of this nature since the king's restoration, than were in forty years before. For cunning people will be always finding out perpetuities, and are fond of limitations tending to perpetuities, not only in inheritance, but in terms for years. After Manning's case, the conveyancers did contrive these trusts of terms for years to go beyond that case. For they seemed to argue thus; that being good by way of executory devise, then we will declare a trust, and that the law has nothing to do with, it is a creature of equity, and governable by equity. And I have seen a conveyance of this nature made by my lord of Leicester to Marriot and Western, drawn 1658. where there was the trust of a term limited over after an estate-tail; but that was never insisted upon to be good, all the cases being otherwise. If then it be not good by way of executory devise, it cannot be good by way of limitation of the trust of a term. Now in this case, certainly it would not be a good remainder by way of executory devise. For when a term is devised to end in tail, no man will say a remainder of the term can be limited over. As for the case of Wood and Saunders, that, my Lord, I conceive had been good by way of executory devise. A man that hath a term, deviseth it to his wife for life, and if John his son be living at the death of his wife, then to him in tail; but if he die without issue, living the wife, then to Edward, that might be good. For it is a condition precedent as to John, and there he must survive his father and mother, or he takes nothing; but he dying before them, never vested in him at all, and so might well vest in Edward. But in our case it is void in the creation, because in the case here before your Lordship it did vest, and was to attend the inheritance, when the contingency happens: can it then enure to the plaintiff by way of springing trust? Surely no. In Wood and Saunder's case it never vested, in our case it did vest. But I must, my Lord, crave leave to say one word to another point in the case, and that is the recovery. When contingent remainders in law, in cases of settlements, may be by any act in law barred, this court, I con-

Trusts of
terms, when
introduced.

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ceive, will not set them up again. Now in this case before the contingency happened, when the estate-tail of the inheritance was in my Lord Duke of Norfolk, and the lease for two hundred years attendant upon that estate-tail, then both my Lord Duke suffer a common recovery, which we apprehend hath so barred and destroyed this term, that this court will never interpose to set it up again. My Lord, that which on the Duke's behalf we now desire is, that your Lordship will be pleased to take some further time to consider of it, and deliver your judgment the next term.

[46]
No remainder,
but a spring-
ing trust upon
a contingency.

Mr. Serj. M. My Lord, I did not expect, I must confess, an argument at this rate, and at this time; but your lordship in great tenderness and favour hath given them leave to do it: but after all, under favour, what they say is a great mistake of the case. If they had observed what was said, and truly applied it, they would have answered themselves. What interpretation in such a case shall be made, or not be made, is merely matter of equity, which upon the circumstances of every case is governable by the circumstances. I would not go after their example to argue, to support, as they have done, to overturn the opinion of the court that has been delivered. But I would offer this to your lordship; there is a great mistake in calling this a remainder, it is no such thing as a remainder: it is indeed a springing trust upon a contingency: but pray, my lord, consider how it stands here in equity before your lordship. Here is a noble and great family, the heir of it under the visitation of the hand of God, which no one could remove but God alone; here are a great and numerous issue to provide for, that provision is made according to the rules of nature and justice; and it being necessary to be done, no man could contrive it better than this settlement. My lord, they frighten us with the word perpetuity. It is true, a perpetuity cannot be maintained, that is, an inheritance not to be aliened or barred, or that can never end. But here is but the name of a perpetuity, and certainly, that must be a strange and monstrous perpetuity, that must determine within the short space of a life. A perpetuity is an estate that can never be barred. And Littleton hath a rule, that there is no estate but can be barred, if all the persons concerned in it join. But it is under favour a contradiction, and a great one, to call this a perpetuity; a monstrous one, I say it is, where any man can see the end of it; and whereas to the circumstances of the case, the family could not otherwise be well provided for. And whereas perpetuities are abhorred, it is upon the inconvenience, which hinders other provisions in case of necessity; and it were indeed an inconvenience, that every family should have the misfortunes that were in this, and not be able to provide some sort of remedy for them. Some cases, my lord, have been put by the other side now, which under favour are nothing to the purpose, and would need no other answer than they give themselves. But truly I think it is not fit for the advantage of the public, that after a case has been so solemnly argued, the council should dispute the opinion of the court.

My Lord, I would desire to say a word in answer to some things

that have been urged. As to the case that Mr. H-ch-s put, I think it had been good by way of executory devise. To one and his heirs male, till such an one returns from Rome, or the like, had been good, especially where the determination depends but upon the expiring of a short life. But all this is but *petitio principis*, the same thing over and over. As for Child and Bailly's case, there are several things that differ it from ours. There it hath a semblance of our case, of one dying without issue; but it is there upon a life, and not within a life as ours doth. And in our case, my lord, this limitation to Henry is a limitation of a term attendant upon an inheritance, and then it is plainly as if the limitation of a freehold estate were to one and the heirs of his body, and if such an accident happens, the estate to cease, and be to another for 100 years. As it is in Henry attendant upon the inheritance; it should not if Henry had died have gone to his executor, but to his heir. Then, as to Charles, here is a condition that determines the whole trust as to Henry, and there it begins to be first a limitation of a term in gross. He that creates a term attendant upon an inheritance, may sever it if he will; and if he may sever it, may he not limit it upon a contingency, that upon such a contingency it shall be severed? All conditions are either precedent, or subsequent. Precedent to create a springing trust, and subsequent to destroy the former estate. In Wood and Saunder's case, John did not take, but upon the precedent condition; but Edward took it upon the subsequent condition. In our case this condition is both; as to the destroying of the trust to Henry it is a subsequent condition; but as to the creating a new trust to Charles, it is a precedent condition. My lord. I must not undertake to argue this case, but only to say a little to what was said on the other side; we hope it being upon so short a contingency which has now happened, the limitation of this term to the plaintiff is good, and we pray your judgment for him.

He that creates a term attendant upon an inheritance, may sever it if he will

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The Lord Chancellor's Second Argument.

Lord Chancellor. I am not sorry for the liberty that was taken at the bar to argue this over again, because I desired it should be so; for in truth I am not in love with my own opinion, and I have not taken all this time to consider of it, but with very great willingness to change it, if it were possible. I have as fair and as justifiable an opportunity to follow my own inclinations (if it be lawful for a judge to say he has any) as I could desire; for I cannot concur with the three chief judges, and make a decree that would be unexceptionable: but it is my decree, I must be saved by my own faith, and must not decree against my own conscience and reason.

It will be good for the satisfaction of the public in this case, to take notice how far the court is agreed in this case, and then see where they differ, and upon what grounds they differ; and whether any thing that hath been said be a ground for the changing this opinion. The court agreed thus far

The limitation of the trust of a term and the limitation of the estate of a term all one.

That in this case it is all one, the limitation of the trust of a term, or the limitation of the estate of a term, all depends upon one and the same reason. The court is likewise agreed (which I should have said first, to despatch it out of the case, that it may not trouble the case at all) that the surrender of Marriot to the Duke of Norfolk, and the common recovery suffered by the duke, are of no use at all in this case. For if this limitation to Charles be good, then is that surrender and the recovery a breach of trust, and ought to be set aside in equity; so all the judges that assisted at the hearing of this cause agreed: if the limitation be not good, then there was no need at all of a surrender to bar it, nor of the common recovery to extinguish it.

But then we come to consider the limitation, and there it is agreed all along in point of law, that the measures of the limitations of the trust of a term, and the measures of the limitations of the estate of the term, are all one, and uniform here, and in other cases, and there is no difference at chancery or at common law, between the rules of the one and the rules of the other; what is good in one case, is good in the other. And therefore in this case, the court is agreed to, that the limitations made in this settlement to Edward, &c. are all void, for they tend directly and plainly to perpetuities, for they are limitations of remainders of a term in gross after an estate-tail in that term, which commenceth to be a term in gross, when the contingency for Charles happens.

Thus far there is no difference of opinion: but whether the limitation to Charles, if Thomas die without issue, living Henry, whereby the honour of the earldom of Arundel descends upon Henry; I say, whether that be void too, is the great question of this case wherein we differ in our opinions.

Remainders of terms after estates tail in those terms, are void.

It is said that is void too; and yet (sever it from the authority of Child and Baily's case, which I will speak to by and by) I would be glad to see some tolerable reason given why it should be so; for I agree it is a question in law here upon a trust, as it would be elsewhere upon an estate; and so the questions here, are both questions of law and equity. It was well said, and well allowed by all the judges, when they did allow the remainders of terms after estates-tail in those terms to be void. I shall not devise a term to a man in tail with remainders over; the judges have admirably well resolved in it, and the law is settled, (and Matthew Manning's case did not stretch so far) because this would tend to a perpetuity.

Yet the bare limitation of the remainder after an estate tail, which doth not tend to perpetuity, is not void.

Now, on the other side, I would fain know, when there is a case before the court, where the limitation doth not tend to a perpetuity, nor introduceth any visible inconvenience, what should hinder that from being good: for though if there be a tendency to a perpetuity, or a visible inconvenience, that shall be void for that reason; yet the bare limitation of the remainder after an estate-tail, which doth not tend to a perpetuity, that is not void. Why? because it is not? I dare not say so: see then the reasons why it is so. The reasons that I lie under the load of, and cannot shake off, are these:

The law doth in many cases allow of a future contingent estate to be limited, where it will not allow a present remainder to

be limited; and that rule, well understood, goeth through the whole case. How do you make that out? thus: if a man have an estate limited to him, his heirs and assigns for ever, (which is a fee-simple) but if he die without issue, living J. S. or in such a short time, then to J. D. though it be impossible to limit a remainder of a fee upon a fee, yet it is not impossible to limit a contingent fee upon a fee. And they that speak against this rule, do endeavour as much as they can to set aside the resolution of Pell and Brown's case, which (under favour) was not the first case that was so resolved; for, as I said before, when I first delivered my opinion, it was resolved to be a good limitation. 10 Eliz. in the case of Hinde and Lyon, 3 Leonard, 64. which by the way is the best book of reports of the later ones that hath come out without authority. If that be so, then where a present remainder will not be allowed, a contingent one will. If a lease for years come to be limited in tail, the law allows not a present remainder to be limited thereupon, yet it will allow a future estate arising upon a contingency only, and that to wear out in a short time.

The reasons.

But what time? and where are the bounds of that contingency? you may limit, it seems, upon a contingency to happen in a life: what if it be limited, if such a one die without issue within 21 years, or 100 years, or while Westminster-Hall stands? where will you stop if you do not stop here? I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee-simple upon a fee-simple are not yet determined, but the first inconvenience that ariseth upon it will regulate it.

First of all, then, I would fain have any one answer me, where there is no inconvenience in this settlement, no tendency to a perpetuity in this limitation, and no rule of law broken by the conveyance, what should make this void? and no man can say that it doth break any rule of law, unless there be a tendency to a perpetuity, or a palpable inconvenience. Oh yes, terms are mere chattels, and are not in consideration of law so great as freeholds, or inheritances. These are words, and but words, there is not any real difference at all, but the reason of mankind will laugh at it: shall not a man have as much power over his lease as he has over his inheritance? if he have not, he shall be disabled to provide for the contingencies of his own family that are within his view and prospect, because it is but a lease for years, and not an inheritance of a freehold. There is that absurdity in it which is to me insuperable, nor is the case that was put, answered in any degree. A man that hath no estate but what consists in a lease for years, being to marry his son, settled this lease thus: in trust for himself in tail, till the marriage take effect; and if the marriage take effect while he lives, then in trust for the married couple; is this future limitation to the married couple good or bad? if any man say it is void, he overthrows I know not how many marriage-settlements: if he say it is good, why is not a future estate in this case as good as in that. when there is no tendency to a perpetuity, no visible inconvenience?

A new spring-
ing trust upon
the same term
as reasonable
as a new
springing
lease upon the
same trust.

All men are agreed, (and my lord chief justice told us particularly how) that there is a way in which it might be done, only they do not like this way; and I desire no better argument in the world to maintain my opinion, than that; for, says my lord chief justice, suppose it had not been said thus; if Thomas die without issue, living Henry, then over to Charles; but thus, if it happens that Thomas die without issue in the life of Henry, &c. then this term shall cease, and there shall a new term arise and be created to vest in Charles in tail, and that had been wonderful well, and my lord of Arundel's intention might have taken effect for the younger son. This is such a subtilty as would pose the reason of all mankind: for I would have any man living open my understanding so far, as to give me a tolerable reason why there may not be as well a new springing trust upon the same term to go to Charles, upon that contingency, as a new springing lease upon the same trust: for the latter doth much more tend to a perpetuity than the former doth, I am bold to say it.

But I expect to hear it said from the bar, and it has been said often, the case of Child and Baily is a great authority; so it is. But this I have to say to it, first, the point resolved in Child and Baily's case was never so resolved before, nor ever was there such a resolution since. Pell and Brown's case was otherwise resolved, and has often been adjudged so since. In the next place, I will not take much pains to distinguish Child and Baily's case from this, though the word (assigns) and the grant of the remainder by the mother, who was executrix, are things that Rolls lays hold on as reasons for the judgment. But I know not why I may not, with reverence to the authority of that case, and the learning of those that adjudged it, take the same liberty as the judges in Westminster-Hall sometimes do, to deny a case that stands single and alone of itself. And I am of opinion the resolution in that case is not law, though there it came to be resolved upon very strange circumstances to support such a resolution; for the remainder of a term of seventy-six years is called in question when but fifteen years of it remained, and after the possession had shifted hands several times, and therefore I do not wonder that the consideration of equity swayed that case.

But I put it upon this point; pray consider, there is nothing in Child and Baily's case that doth tend to a perpetuity, nor any thing in the settlement of the estate there, that could be called an inconvenience, nor any rule of law broken by the conveyance; but it is absolutely a resolution *quia volumus*. For it disagrees with all the other cases before and since; all which have been otherwise resolved; but it is a resolution, I say, merely because it is a resolution. And it is expressly contrary to Wood and Saunder's case, which no art or reason can distinguish from our case or that. For here was that case which was clipt and minced at the bar, but never answered. Wood and Saunder's case is this: to the husband for sixty years, if he lived so long; to the wife for sixty years, if she lived so long; then if John be living at the time of the death of the father and mother, then to John; but if he die without issue, living father or mother, then to Ed-

ward. Suppose these words (living father or mother) had been out of the case, and it had been to John, and if he die without issue, to Edward, will any man doubt, but then the remainder over had been void, because it is a limitation after an express entail? How came it then to be adjudged good! because it was a remainder upon a contingency, that was to happen during two lives, which was but a short contingency, and the law might very well expect the happening of it? Now, that is this case; nay, ours is much stronger: for here it is only during one life, there were two.

The case of Cotton and Heath in Rolls comes up to this; a term is devised to A. for eighteen years; the remainder to B. for life, the remainder to the first issue male of B. which is a contingent estate after a contingency, and yet adjudged good, because the happening of the contingency was to be expected in so short a time. Now that case was adjudged by my Lord Keeper Coventry, Mr. Justice Jones, Mr. Justice Crook, and Mr. Justice Berkley, as Wood and Saunder's case was by my Lord Keeper Bridgman, Mr. Justice Twisden, and Mr. Justice Rainsford; so that however I may seem to be single in my opinion, having the misfortune to differ from the three learned Judges who assisted me, yet I take myself to be supported by seven opinions in these two cases I have cited.

If then this be so, that here is a conveyance made which breaks no rules of law, introduceth no visible inconvenience, savours not of perpetuity, tends to no ill example, why this should be void only, because it is a lease for years, there is no sense in that.

Now if Charles Howard's estate be good in law, it is ten times better in equity. For it is worth the considering, that this limitation upon this contingency happening, (as it hath, God be thanked) was the considerate desire of the family, the circumstances whereof required consideration, and this settlement was the result of it, made with the best advice they could procure, and is as prudent a provision as could be made. For the son now to tell his father that the provision that he had made for his younger brother is void, is hard in any case at law; but it is much harder in chancery, for there no conveyance is ever to be set aside, where it can be supported by a reasonable construction, and here must be an unreasonable one to overthrow it.

I take it then to be good both in law and equity; and if I could alter my opinion, I would not be ashamed to retract it; for I am as other men are, and have my partialities as other men have. When all this is done, I am at the bar desired to consider further of this case: I would do so, if I could justify it; but expedition is as much the right of the subject, as justice is, and I am bound by Magna Charta, *nulli negari, nulli differe justitiam*. I have taken as much pains and time as I could to be informed; I cannot help it if wiser men than I be of another opinion; but every man must be saved by his own faith, and I must discharge my own conscience.

I have made several decrees since I have had the honour to sit in this place, which have been reversed in another place, and yet I was not ashamed to make them, nor sorry when they were re-

Remainder upon a contingency that may happen in a short time good.

Roll. Ab. tit. Devise, 612.

Cases in Chancery. 1 part. 131.

No conveyance to be set aside in Chancery, where it can be supported by a reasonable construction.

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Expedition as much the right of the subject as justice is.

Of Cases ad-
journed, Prop-
er Difficul-
ties.

versed by others. And I assure you, I shall not be sorry if this decree which I do make in this case be reversed too; yet I am obliged to pronounce it, by my oath and by my conscience. For I cannot adjourn a case for difficulty out of an English Court of Equity into the parliament; there never was an adjournment *propter difficultatem*, but out of a court of law where the proceedings are in latin. The proceedings here upon record are in English, and can no way now come into parliament, but by way of appeal, to redress the error in the decree. I know I am very likely to err, for I pretend not to be infallible; but that is a thing I cannot help. Upon the whole matter, I am under a constraint, and under an obligation which I cannot resist. A man behaves himself very ill in such a place as this, that he needs to make apologies for what he does; I will not do it. I must decree for the plaintiff in this case, and my decree is this

The Decree.

That the plaintiff shall enjoy this barony for the residue of the term of two hundred years; the defendant shall make him a conveyance accordingly, because he extinguished the trust in the other, and the term contrary to both law and reason, by the merger and surrender, and common recovery. And that the defendants do account with the plaintiff for the profits of the premises by them or any of them received since the death of the said Duke Thomas, and which they or any of them might have received without wilful default; and that it be referred to Sir Lacon William Child, Knight, one of the Masters of the Court, to take the said account, and to make unto the defendants all just allowances; and what the said master shall certify due, the said defendants are to pay unto the plaintiffs, according to the master's report herein to be made: and that the defendants shall forthwith deliver the possession of the premises to the plaintiff, and that the plaintiff shall hold and enjoy the said Barony of Grostock, with the lands and tenements thereunto belonging, for the residue of the said term of two hundred years, against the defendants, and all claiming by, from, or under them. And it is further ordered and decreed, that the said defendants do seal and execute such a conveyance of the said term to the plaintiff as the master shall approve of, in case the parties cannot agree to the same; but the defendants are not to pay any costs of the suit.

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Die Veneris, 19 Junii, 1685.

The decree af-
firmed in Par-
liament.

After hearing counsel two several days upon the petition and appeal of Charles Howard, Esq. showing, that his father intended a provision for his younger children, by deed, made by advice of eminent counsel, and did settle the barony of Grostock, and other lands, of the value of five hundred pounds per annum, in trustees, in order thereunto; and that after a long suit in chancery, wherein the petitioner was plaintiff, against his Grace the late Duke of Norfolk, the Marquis of Dorchester, Henry Lord Mowbray, and Richard Marriot, Esq. defendants, the cause coming to be heard before the Lord Chancellor Nottingham, on the 17th of June, in the four and thirtieth year of his late majesty's reign, of

glorious memory; who after several days hearing, did declare his opinion to be, that the petitioner had a good title to the barony of Grostock, and other the lands in question; and decreed the defendants to account to him for the profits thereof by them received after the death of Thomas, late Duke of Norfolk; which decree was signed and enrolled, and the petitioner actually vested in the possession of the said manors and premises; and further sheweth, that the defendants, the late Duke of Norfolk, the Lord Mowbray, now Duke of Norfolk, and Richard Marriot, exhibited a bill of review into the high court of Chancery, for reversing the said decree; to which the petitioner put in a plea, and demurrer: which being argued on the 15th of May, in the five and thirtieth year of the reign of our late King Charles II. before the Right Honourable the Lord Keeper of the great seal of England, who after hearing counsel on both sides, over-ruled the said plea and demurrer, and reverted the decree aforesaid: and ordered a writ or writs of restitution, to be directed to the sheriffs of Cumberland and Westmoreland, to put the plaintiffs in the bill of review in possession; which accordingly was done, as in the petition, amongst other things, is suggested; and prayed a reversal of the last decree; as also upon answer of the Right Noble Henry, Duke of Norfolk, Earl Marshal of England, and Richard Marriot Esq. put in thereunto. And after due consideration had of what was offered at the bar by counsel on either part thereupon, it was ordered and adjudged by the Lords spiritual and temporal, in parliament assembled, that the said decree made in the High Court of Chancery, on the 15th of May, in the five and thirtieth year of the reign of the late King Charles II. of glorious memory, in behalf of the late Duke of Norfolk, and Richard Marriot, Esq. be, and is hereby reversed; and that the decree made in the said Court of Chancery, on the 17th of June, in the four and thirtieth year of his late majesty's reign, in behalf of Charles Howard, Esq. the now petitioner be, and is hereby affirmed.

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JOHN BROWNE, Cler. Parl.

The arguments of the Lord Keeper Somers, the Lord Chief Justice Holt, Lord Chief Justice Treby, and Mr. Baron Powel, when they gave judgment for the Earl of Bath.

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Die Martis 12 Decembris, 1693. In the Middle-Temple Hall, Com. Mountague & alii versus Com. Bathen & al. & contra.

This day being appointed by my Lord Keeper to hear the opinions of the two Chief Justices, and Mr. Baron Powel, who assisted at the hearing of this cause, and to deliver his Lordship's own judgment therein; Mr. Attorney-General moved on the behalf of the Earl of Mountague, &c. for the judgment of the court, and Mr. Baron Powel delivered his opinion first.

Baron Powel's
argument

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Vid. the case
at large, inf.

Whether a
Deed on
which a trial
at law hath
been, may be
set aside in
equity.

Objections.

That it having
been affirmed,
by a verdict at
law, it ought
not.

Answer to the
first objection.
Surprise, what

Surprise not
sufficient to
set aside a
deed after a
verdict, unless
mixed with
fraud.

Mr. Baron Powel. The Question in this case is, Whether there be any ground in equity, to set aside a deed of release made in July, '81, for the settlement of the late Duke of Albe-marle's estate, by which my Lord of Bath claims. The validity of this deed hath been tried at law upon an ejectment in the court of King's-Bench, by direction of this court, where the title has been found for the Earl of Bath by the strength of this deed : so that it must be agreed my Lord of Bath hath a good title at law, because the verdict hath found it so, and all parties concerned have hitherto acquiesced under this verdict.

This case comes now back upon the equity reserved, and it is only now to be considered, what matters of equity have been offered to avoid this title thus found at law. And those I think may be reduced to five heads.

First, That this deed was obtained by surprise and circumvention.

Secondly, That it was a concealed and forgotten deed.

Thirdly, That this is a deed attendant upon a will, and so revocable in its own nature, although it had no power of revocation in it.

Fourthly, That there is an implied trust in this deed, that the duke might have charged the estate to the full value, and consequently might well dispose of it in equity.

Fifthly, That the great solemnity and deliberation used about making the last will, and the publishing that will, do amount to a revocation in equity, notwithstanding that the circumstances of the power are not strictly pursued.

I am of opinion in this case, that this deed having been affirmed by a verdict upon a solemn trial at the bar at law, none of these matters are sufficient for to ground a decree in a court of equity, to set aside this deed ; and I shall give you my reasons for this opinion in the same order I mentioned those heads in, with particular answers to the particular objections under each head.

1. It is said, This is a deed that was obtained by surprise and circumvention. Now I perceive this world surprise is of a very large and general extent. They say if the deed be not read to, or by the party, that is a surprise : nay, the mistake of a counsel, that draws the deed either in misrecitals, or other things, that is a surprise of a counsel, and the surprise of the counsel must be interpreted the surprise of the client. These things have been urged in this case, and I thought fit to mention them for the introducing my reasons against this head of argument : And it is this :

That if these things be sufficient to let in a court of equity to set aside deeds found by verdict to be good in law, then no man's property can be safe : I hardly know any surprise that should be sufficient to set aside a deed after a verdict, unless it be mixed with fraud, and that expressly proved ; and I know not of any such proved in this case.

It is true, Duke George by his will, and the settlement made upon his son at his marriage, takes no notice of, nor makes any

provision for the Earl of Bath ; but that, I take it, is not to be regarded as any way material at all, because he takes no notice, in either of them, of any body else but him that was his heir. But I must observe here by the way, that there was not only a very near relation between Duke George and the earl of bath, but a very intimate friendship cultivated by mutual offices of kindness between them to his death. And I must mention one particular, because to me it seems a clear answer to this objection, that is, his making no provision for the earl in the will, or settlement, might be the occasion why Duke George did make such an earnest application to King Charles the Second, that upon failure of his issue male, his majesty would be pleased to bestow the dukedom upon the earl, and annex Theobalds to it, which would then revert to the crown. And that king did often promise he would, and afterwards did it solemnly under the sign manual.

But then it is said, that after this D. Christopher made his will, and therein there is no notice taken of any such disposition of his estate to the Earl of Bath ; but that is not, I think, to be regarded neither, because that was a will only of his personal estate, and made when he was under age, and could not dispose of his real estate.

Then come we to the year 1675, when the will was made, to which this deed has some relation, and by that will D. Christopher doth settle a great part of his estate, upon failure of issue of his own body, upon my Lord of Bath. There is no pretence of any surprise upon the duke when he made his will, and it is plain then he had an intention that my Lord of Bath should have a great share in his estate if he died without issue.

Now then it is to be considered what there is of proof in this case, of any thing that might be a ground to conceive why he should alter this intention between the years 1675 and 1681, when this deed was made. There is no proof of any misunderstanding between the duke and the earl in that interval ; but on the contrary, that there was a continual friendship and intercourse of kindness between them all the while, as doth appear by a continual succession of letters and other correspondencies passing between them in those years, one of which I cannot choose but take notice of, because of the date to it, to wit, in June 1681, upon my Lord Landsdown's intention to travel ; wherein the duke takes notice of the interest he had in my Lord of Bath's family, and particularly in his eldest son, as the greatest, next to that of the earl himself : and I say, I mention this letter because of the date, that it is so very near the date of the deed, that it is possible the deed was then made, because it was within a month after that letter, sealed and executed ; therefore it might well be referred to in it.

Next this appears to be a deed drawn by the D. Albemarle's own counsel, Sir Thomas Stringer ; for it is proved the paper-drafts is all of his son's hand-writing, except the first and last sheet, and all of it interlined with Sir Thomas his own hand : Errington has proved the abstract of all Sir Thomas his hand,

with the very date in it, and swears that Sir Thomas examined it with him. Now is it to be imagined that Sir Thomas Stringer should prepare such a settlement for the duke to execute without any order or instructions from him about it? No, certainly that cannot be thought. But they say Sir Thomas Stringer, if he did draw it, might forget it, or overlook it, and he now denies any knowledge of it. Truly I cannot value much what Sir Thomas Stringer has sworn in this case, he is not consistent with himself, and makes but a very odd figure in the cause.

Mr. Stringer. My Lord, I beg your pardon for interrupting Mr. Baron Powel, but I must vindicate my father; he never swore a word in this cause.

Lord Keeper. No, he did not, he was dead before the cause came into court. That was a mistake.

Mr. Baron Powel. I am sure there was oath of what he had said about this deed.

Mr. Stringer. That, my Lord, you may make what you please of, but he never made any oath in the cause.

Mr. Baron Powel. But that which I mention him for, was, that there is proof apparent, that he was advised with about this deed; and he was the duke's constant counsel. I do not think, I confess, that Sir William Jones did draw this deed; it is not insisted upon by the counsel of my Lord of Bath that he did; and any one that considers the frame of it will think as I do. But I conceive he was advised with upon the proviso, and the writing in the margin against the proviso; I approve of this proviso; I believe it to be his hand; though several persons of good credit, that were well acquainted with his hand, have sworn they believe it not to be his hand. But they might be mistaken, and to me it appears by the comparison of the records, deeds and papers in open court; for it is plain, according to the various nature of the several things he writ, or set his hand to, he did write several hands, and particularly wrote his name sometimes one way, and sometimes another. And therefore upon comparison of that with other papers, I do believe it to be his hand.

The next thing I would mention is this: here are six subscribing witnesses to the sealing and executing of this deed at Albermarle House, of which Sir William Jones was one: and one Alleman, that is one of the witnesses, swears, that when the Duke delivered the deed to the Earl of Bath, he wished he could have done more for him. It was probable then the Duke believed he had done something for him; and it is very probable too, he knew what he had done for him, when he wished he was able to have done more. And Mr. Prideaux swears, (though he does not exactly fix the time) that the Duke told him himself, he had settled his estate upon the Earl of Bath. Then I say, it is hard to believe the Duke was surprized in making this deed, when his own constant counsel drew it, so able a counsel perused and approved so main a part of it, and was present at the execution of it, and he should express his wishes to be able to do more, can he be supposed not to know what he did?

But now let us examine the evidence and objection on the other side; they said it doth not appear that this deed was ever read to

the Duke, or by him. It is indeed proved the last will was read to him by my Lord Ch. Justice Pollexfen, but not at the same time of the executing of it. But however I think the not reading of a deed to, or by the party that executes it, is a very slender objection to make out a surprise, so as to set it aside. That would shake many a conveyance; I doubt it would shake many deeds that were made and executed by the Duke. For though he was so cautious as some of their witnesses say, that he would not execute any deeds, but what his counsel set their hands to, yet I do not find that any of them used to be read to him, or he himself read them at the time he sealed them. Therefore it is a dangerous doctrine to set aside a deed upon such an account. Some people will not have leisure to hear deeds read, or read them themselves.

The not reading a deed to, or by the party that executes, a slender objection to make out a surprise.

Then they object the mistakes and misrecitals of the limitations of the will in the deed, which refers to the will, as particularly that of Norton Disney, and some others of less moment; but God forbid that the mistake of a counsel in a recital in a deed, should be of that great moment as to set aside the deed when executed by the party.

But there is another matter much insisted on by them as an argument of surprise; that is, this deed is pretended to be made in confirmation of the will in '75, and yet it varieth from that will in almost all the limitations of the estates, except in some part of that to my Lord of Bath. I confess I have looked over the variations, and there are several, but I have this in general to say to it, that I take it this deed was made for the sake of the Earl of Bath; and that it was for the Earl's better security, that he bound himself up by so strict a proviso not to revoke. And if you look into the deed, it will be found to confirm the will as to my Lord of Bath, which was the main point of both deed and will. For it sets the estate given to him upon a firmer foot than it was by the will which was revocable in its nature: therefore it must be intended, as no doubt it was, for that very purpose to secure it more to my Lord of Bath, than it was by the will.

But that which is said to be an argument of the greatest weight and moment in this matter, that there must be surprise in the case, is this; it is hardly to be believed, and almost impossible, that the Duke should send for Mr. Monk out of Holland, by his will desire the King to bestow upon him the Barony of Potheridge, the ancient seal of the family, make a disposition of his estate by a will so solemnly prepared and deliberated upon, take care to have three parts of it; one whereof was to be transmitted to the Dutchess of Newcastle, another part delivered by himself to Mr. Monk, and the third part taken with him to Jamaica, and there pulled out and declared to be his will, and yet intend no real disposition of his estate by all this. These are things so dishonourable to the Duke, that they are not easily to be believed of a man of his honour and quality.

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I confess this is an objection of great weight, and carrieth much presumption with it, but it is presumption only, which how far it shall conclude against a verdict, is left to consideration. But be-

sides, I would put the case upon a like bottom of presumption the other way, and then see what we shall make of it. Duke George prevails with R. Charles II. to promise to make the Earl of Bath Duke of Albemarle, upon his failure of issue male: Duke Christopher, when he comes of age, doth make a settlement of his estate upon the Earl of Bath upon failure of issue of his body. The Earl of Bath is a person that doth heap obligations upon both Dukes and their family, is assistant to the Duke, both in the purchase and sale of Albermarle-House, is continually the chief person concerned in all his affairs, nothing almost is done without him. There is no proof of any misunderstanding, or ground for any, between them. Nay, it was the report in the family, that if the Duke died without issue, the Earl of Bath was to have the estate: he and Sir Walter Clarges are the Duke's near relations; whereas Mr. Monk, that I said, is not in the case proved to be at all a-kin to him, and so we must not make him to be related without proof, but only that the Duke called him cousin.

Now after all this, that the Duke should make his last will, and give all this estate to a stranger (for so as to any thing appears in proof) and give nothing to the Earl of Bath, when by the former settlement he had given him such hopes of so great a share; this I think is a very unaccountable thing; and, I confess, I know not how to extricate myself out of the confusion it causes in me; but I must set the one against the other as to that objection, and leave the matter in the dark, as to the Duke's honour, as I found it; though, I think, I may give a further answer to this objection under the second head.

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But I must speak something more under this head, for I would omit nothing that I conceive to be material in the case. There is another thing objected that seems dark in this case, and that is, what was the meaning of some parchments that were ingrossed by Thompson, the summer before the Duke went to Jamaica? The jury have found that this deed was executed in '81: and if then the other side would make use of this, as insinuating that they were the same deeds, then that is not to be admitted, as being expressly against the verdict. But to me it seems, that these deeds in '87 were made upon some design to have them executed, then perhaps to settle the estate upon a firmer foot than it was thought before. The Earl of Bath perhaps might be jealous that the Dutchess might prevail upon the Duke to revoke the former deed in due form: and therefore these deeds might be prepared absolutely without any power of revocation, and thought he might procure the Duke to seal them so before he went to Jamaica: I say that might be the intention, though what was the design I cannot really tell.

But admitting that such writings were prepared with such a design to get the Duke to execute them, I know not that all this put together will be a sufficient ground in equity to set aside the deed in '81. For all designs in gaining of deeds will not avoid deeds actually made: and that is plain from the case of Bodmin and Roberts, that was one of the precedents used in this case, which was in short thus:

Mr. Roberts, son to the late Earl of Radnor, married the only daughter and child of Bodmin, who was so passionately fond of his daughter, that whenever she was in his presence, he would break out into great fits of passion, and weep for joy to see her. Notwithstanding this great fondness of his daughter, one Mr. Wynne took an opportunity when Mr. Podmin was under arrest, and officiously came to bail him, and insinuates into him, that his son-in-law was the occasion of his being arrested; and thereupon wrought so far upon him as to get him into a private place, where he was removed out of his son and daughter's knowledge, and where he went by a strange name: no one of his friends had any access to him but Wynne himself, and such as he would permit. Mr. Roberts made frequent application to be admitted to him, but was refused, which was all in proof. While he was under this concealment, Wynne tampers with one Barry that had Mr. Bodmin's will in his custody, and would have had him suppressed that will, whereby he gave his estate to his daughter. It happens, during his being thus secured, he fell sick, then there is a will prepared for him to give this estate away to Wynne from his only daughter; they get three witnesses to the execution of it. This will was never read over to him: this appears in the proof; but they get him to execute it: and he dies. Hereupon Mr. Roberts exhibits his bill in this court to set aside this will. There was proof made of all this matter that I have opened, and this point of surprise in obtaining this will was insisted upon strongly. The Lord Chancellor at the hearing of the cause was assisted by the Chief Justice *Bridgeman*, the Chief Baron *Hales*, and Justice *Rainsford*. But notwithstanding all this proof, they could not prevail to set aside this will in this court; and afterwards when they came into the House of Lords, they were of the same opinion, and it ended at last in relief by the legislative power, an act of parliament.

Bodwin and Roberts' case.

This now I take to be much stronger for relief, if any could be, than the case now in question; and if then upon such apparent surprise and practice it could not be set aside in equity, sure this cannot, where there doth appear no proof at all of any such thing.

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2. I come then to consider the second head of argument against this deed, that it was a concealed and forgotten deed. Now that it was concealed from the Dutchess, and those that were thought her agents, I agree it so; and it is plain, it was always intended it should be so. But that it was concealed from the Duke, I think has no ground at all. The thing they would infer it from is the evidence of Aleman, whose testimony was read once and again: and he says this deed, at the time of the execution of it, was delivered to the Earl of Bath; whence they infer he carried it away, and kept it concealed from the Duke, who forgot it: but upon reviewing Aleman's deposition, it can be understood to mean no other, but only delivered to that effect as a deed to his use; but not that it was delivered to him for custody, and carried away by him.

Answer to the second objection.

No, truly, it seems plain to me from all the proofs and circumstances of the case, that this deed did remain in the custody of

the Duke of Albemarle; for that Sir Thomas Stringer, a little before the Duke went into Jamaica, doth draw an abstract of it, in which the very date is mentioned; which could not be drawn from the paper-draft, where the date is in blank, but must be from the deed itself: and how should he have the deed to do it by, unless it was in the Duke's custody?

Besides, there is a strong proof, that the will of '75 was in the Earl's custody once; for the Duke sent to him into the country for it, and the Earl brought it up with him; for it is plain by the wording and framing of the last will in '75, my Lord Chief Justice Pollexfen had it in his custody for comparing the one with the other; they run so in the same manner, that it is impossible but he that drew the last, must have the first by him at the same time.

How then came this deed of '81, and this will of '75, into the custody of the Earl of Bath, under the same cover, with the seal of the Duke of Albemarle's coat of arms on it? for so it was produced first by the Earl of Bath, after the notice of the Duke's death in Jamaica. This cannot be imagined how it should be any otherwise, than as the Earl of Bath says in his answer, that they were delivered so to him by the Duke, a little before his going beyond sea; or else that the Earl of Bath found them so sealed up and covered among the Duke's writings. And either way it is a mighty strong proof, that the deed was all along, till he went to Jamaica, in his own custody, and not in the Earl of Bath's.

But however it is further objected, that it was a forgotten deed. Methinks what I last urged is a very good proof it was not forgotten; but there is yet further proof of it. Not long before he went abroad, the Duke had some discourse with Mrs. Crofts, who (as she swears) was told by him, that she should have a good neighbour at Newhall, if he should miscarry beyond sea, to wit, my Lord of Bath. And Lane, that is one of the Duke's servants, both swear, that the Duke told him, that after his death, the Earl of Bath would have Newhall. Mr. Crofts swears, that upon his application to know who he should address to in case of his Grace's death, the Duke told him: all he could do for him, was to recommend him to the Earl of Bath and Sir Walter Clarges, and ordered him to leave the keys of his writings with the Earl of Bath; for he was most concerned in them, in case he should be otherwise than well.

It is proved, that the usual discourse of the family was, that the Earl of Bath would have the estate after the Duke's death, which must happen from some expressions of the Duke to that purpose. And Sir Walter Clarges doth in his answer swear, that the Duke told him he had provided for him, as the Earl of Bath knew, which could be only by this deed. And Mr. Greenville swears in his answer much to the same purpose. And Mr. Courtney swears, that eight or nine years ago, my Lord of Bath came to him with a draft of a settlement to the same effect, to advise upon; and about three months before the Duke went to Jamaica, he came again with a copy of this settlement, to advise, whether?

will would revoke it; and that he gave his opinion it would not, if the circumstances of the power were not pursued.

But now here the objection recurs again: is it possible to be believed that the Duke should deliberately make so solemn a will, take six months time in the drawing and publishing of it, and then execute it in the presence of three witnesses, if he had not forgot this deed, but had known all along that there was such a one? If he did know it, and had acquainted the counsel that drew his will with it, certainly he would have advised him, that unless he did revoke it, according to the circumstances of the power, all this care and solemnity would signify nothing.

Truly on the other side it is to be considered, whether the six months was taken up in deliberation and solemn preparation for making of that will; or, whether that was not an evidence of a difficulty to prevail upon the Duke to do it at all: for I must take the liberty to say, there are proofs in the case of importunities used to bring him to it. Dr. Benwick did tell the Duke, unless he did it, the Dutchess would have a return of her distemper, and be very bad again. It is proved, that when money is to be paid for the counsel's fees, upon drawing it the Duke was uneasy, and said, the Dutchess might pay it if she would, for it was her business. There appears great difficulty afterwards to get him to execute it, that Sir Thomas Stringer importuned him much to it; upon which he grew very much in favour with the Dutchess, and there was inquiry made for a Baronet's patent to be got for him; all to engage him the more to get this work done: how doth he bring it about? the Duke was that day to go by appointment to Sir Robert Clayton's, to meet with my Lord Jefferies, and seal the deeds of purchase of Dalby and Broughton. Sir Thomas takes this will in three parts, and three witnesses along with him to Sir Robert's; and after my Lord Jefferies was gone, and the Duke in a fretting discontented humour, he gets him into a private room in that house, and then tells him he had brought his will to him to seal; and the Duke, as Mr. Crofts swears, was unwilling to do it then, and would have put him off; but he pressed the Duke very hard to do it then, and told him he must do it, for he was to be gone the northern circuit the next day, and could not be at the execution of it; upon which he did it, but not till after much urging and solicitation.

Now I would argue hence, why should the Duke of Albemarle be uneasy, and disturbed, at his being importuned to execute this will, after so much pains and so much time in the drawing and preparing it? I cannot imagine any reason why, but that he had not forgotten this deed, which he never intended to alter, and yet must do something to satisfy somebody's importunity. He knew he should, in doing it, do a thing that would look very oddly one day, and that made him so uneasy, though at last he did comply and did it.

But admit this deed had been at that time forgotten by him, or concealed from him, would this in a court of equity be a sufficient ground to set it aside? I confess of a purchaser, where one that claims by such a deed, will stand by and permit the purchase to

go on, and conceal the deed; as to that purchase, the deed will be a fraudulent deed; but there is nothing of that in this case, neither such a purchase nor such a concealment; and therefore it can signify nothing here to set aside this deed, though concealed and forgotten.

Answer to the third objection.

3. But now I come to a third head of objections; that this deed is a deed attendant upon the will of 1675, and so revocable in its own nature, as a will would be, although it contained in it no power of revocation. This was very warmly insisted upon by the counsel of Mr. Monk.

A revocable deed attendant upon a will which is revocable, what.

I confess there is such a thing as a revocable deed attendant upon a will, which is revocable; that is, where a man doth suffer a common recovery, and make a deed subject to his last will and testament; such or such a use may be declared by indenture under hand and seal, as intended at that time of the recovery. But this indenture, after it hath declared that use being founded upon an assurance that was always subject to uses declared in his last will, that will being always changeable, the deed may be always changeable: and so is the case in *Dyer* 314. b. and the reason is given in my Lord of Ormond's case, in *Hobart* 349, by the opinion of two Judges against one, because the foundation, which is his last will, is always revocable. But such an indenture to declare uses is revocable; but a scoffment, or a lease, and release to uses referring to a will, or made to confirm a will, that should be revocable, there is no colour nor any authority in law for it.

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Ans. to the fourth obj.

4. The fourth head is, that there is an implied trust, that the Duke might charge this estate to the full value; therefore in equity he might dispose of the land. This objection does arise upon a variance supposed between the engrossed deed and the paper-draft: for it should seem that one of the sheets in the paper-draft is cut just where this trust is declared, and so they will presume it a general trust which would subject the whole estate to the Duke's disposal.

But as to this matter, it is sworn by Thompson, who engrossed the deed, that he engrossed it by the paper not cut, and did engross it truly according to the draft, and he was believed by the jury so to have done: therefore I suppose that it was cut since; and if it were, the question is by whom it was cut: truly, I think it not worth the trouble of inquiring after that, but it is most probable it was not cut by those to whose advantage it would turn to cut it.

But here doth arise a considerable objection; by the will of '75 there are 20000*l.* legacies given, and there is a trust that doth subject this estate to the legacies of that will of '75: shall then the Earl of Bath hold this estate free and discharged of any legacies by the last will?

I must confess this was objected on one side, but not debated on the other side, because they that were of counsel for the Earl of Bath, thought it did not concern this question now in debate. That they said might be a question another time between my Lord of Bath, and any persons that may come here to have any

legacies given them by the will of '87. If the personal estate will not answer, I cannot say positively that they may be payable out of this trust, though I give no opinion in the matter, it not having been debated, and so I have not considered it.

But sure the consequence of that, if it should be so, would not be what this head of arguments I am upon would infer: that if the Duke might charge the estate with legacies, therefore he might dispose of it, for he hath bound himself by this proviso not to dispose of it but under such and such terms.

5. And that brings me to the last head; whether this will of the Duke of Albemarle, made 1687, and so solemnly done, be a revocation in equity, though it do not strictly pursue the circumstances of the power.

I know not any rule more clear in our law-books than this, that all the circumstances, prescribed and required in a power of revocation, must be observed to make it a good and effectual revocation. So is Scroop's case; so is the case of Kibbet and Lee; there is indeed a favourable judgment to be given in expounding powers, but both those cases still agree that all the circumstances must be strictly observed.

It may be said then, they must be observed in law, but in a court of equity it makes another case: for when a man hath a power over an estate, those circumstances are only a guard upon himself that he may not be surprised into a sudden disposition of it: but when deliberately and solemnly he hath done an act whereby he disposeth of this estate, but there wants some little ceremony or circumstance, such as the not tendering 12d. or the like, a court of equity ought to supply such a defect to support his solemn intention to dispose of it. For plain it is, he is not surprised into this act, and so the reason of those circumstances does fail, and they need not be strictly observed.

This way of argument may seem specious in a court of equity, I confess; but really I think I am able to give a very plain answer to it, and that from the nature of powers of revocation, it is certain no conveyance at the common law could have a power of revocation annexed to it. As a feoffment and livery of seisin; and that because the law would not admit such an absurdity, that a man should give an estate absolutely to another, and yet reserve a power to recall it from him at his pleasure. It is such a repugnancy as the common law will not permit. But a man might have done this at common law, he might have annexed a condition to his feoffment, that if he tendered 12d. to the feoffee or his heirs he might enter upon the estate. So that the estate which was devested out of him by the livery of seisin, might have been revested by a performance of the condition and re-entry. So it stood at common law.

But after the 27 H. VIII. for transferring uses into possession, uses become more pliable than conveyances at common law, wherein this matter, and then powers of revocation first came in use and fashion. Not but that it is as repugnant to a conveyance after the statute as it was before, for certainly it is repugnant to give an estate away, and yet have a general power over that

Ans. to the fifth obj.

All the circumstances prescribed in a power of revocation must be observed, to make it good and effectual.

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At law.

Quere, in a court of equity

No conveyance at common law could have a power of revocation annexed.

But a condition might be annexed.

Power of revocation first came in use after the stat. 27 H. 8. c. 10:

estate. But a power of revocation was let in as a condition, and would work as a condition; but whereas the performance of a condition at common law, would not work a revesting of the estate without a re-entry; now the performance or execution of the power doth transfer the estate to the new uses, or revest the estate in him that had the power without any re-entry. But still there is now a necessity of the powers being performed, as there was of the conditions being performed at common law; for it is the nature of a condition and no more. So is *Inglefields case*, 7 Co. 39.

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There was a voluntary conveyance made, with a power of revocation; and he who had the power is attainted of treason. Now all conditions forfeited to the crown must be performed, or no advantage can be taken. This power was in this case agreed to be forfeited to the crown; the great difficulty was, whether the king could perform the condition, or whether the performance was not tied strictly to the person that had the power vested in him. That was the great doubt in that case, but there was no question but it was a condition, and the king should have it as a condition forfeited.

Where a court
of equity may
help, where
not.

And it is likewise agreed in Co. Litt. 238, that it is a condition, and would have been repugnant to be a general power. So that it is not, as they say, a guard only upon a man's self to prevent surprise, but a condition. And as a man must perform a condition at common law to entitle him to a re-entry, so he must execute his power, to entitle him to a revocation. And a court of equity can no more let a man in to defeat an estate upon a power of revocation, without a due execution of the power, than the common law could let a man in to defeat an estate upon a condition, without performance of the condition, or than a court of equity can think to let a man in to defeat a voluntary conveyance, without a power of revocation: for it is all but a condition which must be performed, or no advantage taken of it; and a court of equity may do great things, but they cannot alter things, or make them to operate contrary to their essential natures and properties.

I confess where there is an impediment of executing a power of revocation, or disability of doing it, a court of equity may perhaps interpose. And therefore, suppose the Earl of Bath had always had this deed in his custody from the time of executing it, and the duke having a mind to revoke it, had sent to the earl for it; that though seeing the circumstances required he might truly pursue them, but the earl had refused to deliver it, and the duke not knowing what the power was, had done such act with a mind to revoke it; I agree it reasonable, that a court of equity should interpose to support it. But why is that? because the earl who was to have the benefit by this deed, was the impediment why it was not strictly pursued.

And this is a reason which would prevail at common law. I will put you a case to prove it. *Dyer*. 354. A. makes a feoffment to B. with a power of revocation; if A. at any time during his life pay or cause to be tendered to B. at the Font-stone in the

Cathedral at Sarum 20*l*. A. tenders the 20*l*. at the place in the absence of B. and without any notice to him to attend: this is held to be no revocation. But saith the Book (as it should seem) if he had sent to B. to be there, or some for him to receive the money at the tender, and B. would neither have come nor sent, it had been a good revocation. So that where there is an impediment by the default of the party who is to have advantage by the non-performance of the power; and he that hath the power do an act that expresseth his meaning to revoke, that shall be a good revocation at law.

I likewise agree, that in case of disability a court of equity may interpose; and I agree therefore, that in case the Duke of Albemarle had taken this deed over with him to Jamaica, and there had had an intention to revoke it, and had gone as far as he could to do it, had made his will, and had six witnesses to it, I believe it would be a good revocation in equity, though none of the witnesses were peers, because of the disability he would be under to have such witnesses.

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And so that defective executions of powers of revocations may be helped in courts of equity, in the cases of purchasers, and creditors, I take it to be true too. And it is said other particular cases there may be, wherein a court of equity can relieve, though the revocation be not according to the power reserved. And as to that, I confess several precedents have been cited, and I wonder, considering the nature of them, that more have not been mentioned; but I think there are not above 4 or 5 very much to the purpose, and those I shall take notice of, and trouble you with no more.

The first is the case of Thorne and Newman; and that case is no more in short than this. A. covenants with B. to stand seized to uses with a power of revocation upon the tender of 12*d*. in the Temple Hall. A. tenders the 12*d*. to B.; who accepts it, but not in the Temple Hall. The question was, whether this was a good revocation in equity: truly I believe it was a good revocation in law.

Where acceptance makes a breach in form.

But suppose a man make a lease reserving a rent payable at Michaelmas in the Middle Temple Hall, and there is a proviso of re-entry upon non-payment according to the reservation. The rent is paid by the lessee at the day, but not at the place; and the lessor accepts the rent, and afterwards re-enters for breach of the condition. If he have once accepted the rent, being privy to the deed, that makes it a good performance of the conditions in law absolutely. So is Co. Litt. 212.

And so it is in case of a bond to pay money at a day and place certain; the money is paid before the day, and not at the place, and the obligee accepts the money. If he after bring an action upon this bond, the defendant can plead nothing but payment according to the condition: and in evidence he may give it in proof, that though it was not paid at the place and day, yet being received by the obligee before the day at another place, this is good evidence at law of payment according to the condition: and that appeared in the case of Band and Richardson: Moor

267. *Anderson* 198. *Cro. Eliz.* 142. And this case of *Thorne and Newman* I take to be a good performance at law; where indeed the condition is to be performed to a stranger, that will alter the case, but where it is to one that is privy to the deed, I take it, it is a good performance at law, and consequently must be good in equity.

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Another case cited, was that of *Smith and Ashton*, and that was thus: one *Richard Ashton* conveys his estate in uses, with a power reserved in the conveyance by any writing under his hand and seal, to make provision for younger children. Being sick, he prepares instructions under his hand, in order for counsel to draw it into form; and it is drawn into form and engrossed: but before it is sealed, he dieth; and this was held a good performance of this power in this court. So here is a defect in the execution of a power helped in a court of equity.

As to this case, I would observe, first, this is not a case upon a power of revocation to divest an estate, nor a performance of a condition. But further, here are instructions prepared, and it went as far towards the execution of the power as could be, till an impediment came in the way by the act of God in the death of the party. Now I agree, where there is an impediment by the act of God, or fraud or default of the party, who claims by the deed, equity may interpose. But that does no way come up to the case in question.

Then there is the case of *Dey and Thwaites*, which was lately in this court. *Thwaites* makes a settlement to the use of himself for life, and afterwards to such child and children, and for such estate and estates as he should by any writing under his hand and seal, testified by two credible witnesses, limit and appoint. He afterwards makes a will, and has but two witnesses to it; (so that they did not cite the case right, that said there were not two witnesses) but two witnesses are not enough by the statute to make it a good will, and therefore he giveth a rent of 100*l.* a year to such a child, and dies.

Now one great question was, whether the power being to limit estate or estates, he might limit a rent out of those lands? It was held in equity he might; and truly I think that he might at law. There is, I confess, an opinion against it in the case of *Brown and Tayler*, where there were three judges against one. But really I think it is good at law.

A second question was, whether this being void as a will by the statute, should be yet a good declaration of the trust, and an execution of the power? And I think the court of equity did very well in decreeing it to be good. For though it were not effectual in all points (as it was intended) as a will, yet it was a writing which had all the circumstances required by the power; and therefore I see no reason to question whether it were good.

*Ward and
Booth's case.*

The next case is the case of *Ward and Booth*; and that stands thus: *Sir Thomas Brereton* made a settlement. with a power of revocation, by a writing under hand and seal by two witnesses; and he in a passion one day tore off a label, with the seal, but afterwards repented, delivered it to the trustees to be

preserved to the uses ; and inquiring whether what he had done amounted to a revocation ? and being advised it did not, he was very well satisfied. This cause came to be heard before my Lord Nottingham, and adjudged no revocation, it appearing there was a continued intention not to revoke. But I desire to read part of the ground that decree went upon, for that justifies what I said, in case where there is a disability or an impediment by fraud, this court may relieve though there be a formal revocation.

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There is but one precedent more that I shall mention, and that I take to be directly for the Earl of Bath. It is the case of Arundal and Philpot. Mary Philpot being a widow, seized of lands, made a settlement upon the defendant, with a power of revocation upon the tender of a guinea. She afterwards makes another settlement upon the plaintiff, but without any proof of the tender of the guinea. Upon a bill suggesting her intention to revoke, the plaintiff could not prevail in this court to set aside the first settlement, but was dismissed to law, and ordered to try the title within a twelvemonth, whether revoked or not revoked : and there was afterwards a trial, and the tender of a guinea did happen to be proved, and so the power was well executed at law. But this court would not interpose to set it aside, as a revocation in equity, upon the intention only, without a proof of the due execution.

Arundal and Philpot's case.

And upon the whole matter I conclude, that in a court of equity, there cannot be a revocation of a deed, to which a power to revoke is annexed, but what is pursuant to that power, unless there be either an impediment from the party that claims by the deed, or a real disability to execute according to the circumstances. And I think neither of these are in this case, nor are any of those matters alleged of surprise, circumvention, concealment, or the like, any good grounds to set aside this deed, if they were proved, which I think there is no pretence of.

Conclusion.

Lord Chief Justice Treby.

I am of the same opinion with my brother Powel : I shall state the case as it stands upon this deed and will. The will was made in 1675, the deed in 1681 ; and shall take notice (as I find there was much use made of it on one side) of what the expressions are in the will, and somewhat of what deficiencies there were of expression in this deed.

Chief Justice Treby's Argument.

In 1675 the Duke of Albemarle made his will ; and by that will he declares, that in respect of my Lord of Bath's being one of his nearest kindred, and out of gratitude due to him for many acts of friendship and good offices done to him and his family, his will was that he should inherit all the parts of the real estate not therein otherwise disposed of ; and therein he desires the king to grant to the Earl of Bath, and the issue male of his body, the title of Duke of Albemarle ; and that his eldest son might bear the title of Lord Monk : and this was intended in trust to pay all his debts and certain legacies in the will. He therein gives a legacy of 1000*l.* to Henry Monk (not the father of

The case.

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the plaintiffs the Monks) who it doth not appear was any ways related to him.

Six years after, in 1611, this Duke Christopher makes a deed, and in that deed recites this will true as to the date, but mistakes it in several particulars. This deed settles the main part of the estate after the Duke and Dutchess their death, without issue by the Duke, upon my Lord of Bath, part of it, immediately after his own death, without issue, other parts upon Sir Walter Clarges, and Mr. Greenville: and it has been observed, that almost all the limitations of the estates in the deed differ from those in the will, at least in express terms, if not in very substance.

This deed also sets forth the grounds why the Duke made it; and it is to this effect. He doth declare he was so unfortunate, that his next heir at law was descended from a regicide, and therefore I would observe it was not only to confirm the will, as they would have it, but for preventing so dishonourable a descent of the estate which he owed to the bounty of the crown, and for conveying and settling, and assuring the lands to the uses therein after declared, and confirming and corroborating that will which he did not intend to revoke, and to prevent any claim either by the heir, or any pretended surreptitious will which might be obtained from him by surprise: these are the considerations and reasons expressed in the deed, why he gives this estate away from his heir at law.

Both this deed and will agree in this for substance, that they limit the main part of the estate of the Earl of Bath, though they differ in several of the limitations to diverse persons: and as to some of the limitations to the Earl of Bath, they differ too; whether material or no, shall be considered by and by.

There is in this deed a proviso, which makes the great question in this case, that the Duke should have power to revoke any of the uses in the deed, and limit new ones: but this power is restrained by several circumstances; it must be by writing under his hand and seal, in the presence of six witnesses, three whereof to be peers of this realm, and a tender of six pence to the trustees named in the deed.

Afterwards, in the year 1687, the Duke makes another will, and thereby he giveth some parcels of his land to Mr. Bernard Greenville my Lord of Bath's brother, Sir Walter Clarges, and others, and makes some larger provision for the Dutchess for her life than she had before; but the main bulk and residue of the estate, is by this will given to Col. Thomas Monk, father of the plaintiff's; and he doth likewise in that will make a petition to the King, that he will be pleased to confer a title of honour upon him, and make him Baron Monk of Potheridge, the ancient seat of the family.

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That will of '75, and the deed of '81, are subscribed by six witnesses each, this will of '87, but by three; and so the defect of this will to make it a revocation is, that there are but three witnesses, and none of them peers, and there was no tender of 6d. to the trustees.

The intent of the Earl's bill is, to have an establishment of this deed against this last will; and the intent of the Dutchess and Mr. Monk's bill is, to set aside the deed, and establish this last will and that upon certain grounds of equity, the deed having obtained a credit for it at law.

The intent of the cross bills.

This is the general state of the case, the particulars will be brought in best under the several heads that I shall mention : but first I shall take notice, as I go, what progress this cause has had since it was first in agitation.

First, It was insisted, that this deed was a false deed, and that was thought fit to be directed to a trial at law ; and it was most proper it should be so ; for it concerned a great inheritance and freehold conveyed by deed, and a devise, both titles at law, and that was fit to be decided in the proper judicature for such things, in a court of common law by a jury. Accordingly, this trial was directed in an ejectment at the King's Bench bar ; and this court so far aided the parties to come to the proper question, as to order there should no incumbrances stand in the way, or be insisted upon, but any thing that obstructed the trouble of the right should be set aside : so that, in short, the validity of this deed was the thing directed to be tried ; it was accordingly tried, and thereupon a verdict obtained that a deed was a good deed, and the Earl of Bath's title under it good at law ; and judgment was afterwards entered upon ; and that for the defendant's part was not exclusive : if there had been any misdemeanour on the other side, or in the jury, they might have had redress by applying to this court for a new trial ; nay, they may try it again when they please, upon a new ejectment : but they have acquiesced under it to this day, that is to say, now for two years together : so that we must take it for granted, (at least this court is, I conceive, bound by it) that it is a true deed, and a good conveyance of the estate, as much evidence there is of it as is possible ; so strong an evidence, that we must take it to be a true and a good deed, and a deed without suspicion : twelve men, besides the witnesses to it, have shown the validity of it, (that being the sole question before them) and this must be remembered all along in the consideration of this case.

Particular considerations in the case.

Indeed, the counsel on the other side did seem to speak a little slightly of it, as upon a doubtful evidence, and at last, that it is true by this verdict they must admit that this deed was sealed by the Duke, though that was not a little controverted before : but in truth, here is the right tried ; it was a deed that was a conveyance of the estate, and now we must take it for granted that the whole of the deed was tried and confirmed by the verdict ; so that it is a good conveyance at law, and passeth all that the words can carry. And therefore, in our consideration of this case, we must lay aside all the evidences that was, or was properly to have been given at the trial, as to the truth and validity of the deed : and I, for my part, can allow myself no consideration of this deed in speaking to it, but such as are considerations of equity, consistent with the truth of the deed.

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A deed tried and confirmed by a verdict, passeth all that the words can carry, and the validity not to be questioned.

And that is now the only thing that is to be applied unto, what

there is in equity, and conscience, why this deed should be set aside when it is allowed to be good in law ; there is no doubt but there may be good ground, in some cases in equity, to set aside that which is good at law. But the question is, whether in this case there be any such or no ?

But before I proceed to the consideration of what has been insisted upon in that kind, I desire to take notice of something about the will of '87. I am very well satisfied that that will is well proved : there is my Lord Chief Justice Pollaxfen, hath proved the instructions given for the preparing it, and the drawing of it ; and there are three witnesses that speak to the publication : and this is confirmed by the testimony of Sir Robert Clayton, who transacted the first part of the affair, to bring the Duke and my Lord Chief Justice together : and I do equally reject all the evidence on the one side and the other, against the truth of either the deed or this will.

The heads of equity in this case.

Then this will would have been a good disposition of the lands, if the law did not hinder ; this is, if this deed did not stand in the way, as a prior disposition, and found good in law ; so the deed is good, if equity do not hinder it. Now the grounds of equity which my Lord Mountague's counsel insist upon, are, *I think these*: I have made indeed four of them, but in substance I do not differ from my brother Powel about them, for I comprehend that the deeds being ancillary, as it was called, and attendant upon the will, under the head of a revocation in equity ; I say the heads of equity insisted upon, to set aside this deed, are four.

1. First, Surprise and circumvention in obtaining of it, and that relates to the creation of it.

2. Secondly, Concealment from the Duke, and this by my Lord of Bath, and so he was not informed how his power was circumstanced, and therefore not able to execute his power according to the circumstances, which makes it become a fraudulent deed, and for that cause the plaintiffs shall have relief against it.

3. Thirdly, There is a revocation in equity, though it be not in all points such as would be sufficient in law, yet there is so much done towards it, such a solemnity in the action done, and such an impediment of doing more, as will amount to an equitable revocation.

4. The fourth head is that which was mentioned of the trust in the deed.

Ans. to the first.

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As to the first point of surprise, it was a head much laboured by the case, on the plaintiff's side, and yet I confess I am still at a loss, for the very notion of surprise, for I take it to be either falshood or forgery, that is, though I take it they would not use the word, in this case, fraud ; if that be not the meaning of it, to be something done suddenly and unawares, not with all the precaution and deliberation as possibly a deed may be done.

Surprise what, and how considered in law and equity.

Here was a case cited not long ago, in another great case in this court, out of the civil law, about surprise, but that was under another head : that is, a man was informed by his kinsman that his son was dead, and so got him to settle his estate upon him : this is called in the civil law, *surreptio*. I know not whether

that word will answer those gentlemen's notions about this matter. Now the civilians define that thus, *Surreptio est cum per falsam rei narrationem aliquod extorquetur*; when a man will by false suggestions prevail upon another to do that which otherwise he would not have done.

And I make no doubt but equity ought to set aside that; but then this is properly called fraud, and that must be made out, it can never be intended. I find not any such thing pretended to be made out, that my Lord of Bath did use any false suggestions to the Duke, or informations at all, for what appears in the proof; I beg pardon if I mistake or forget any thing of the proof.

Then here is matter of a surprise objected, which must be something that will not avoid this deed at law, but will avoid a deed in equity, which yet is not direct fraud or falsehood in the party, but is to be gathered out of the particular circumstances of the case; but what in certain to make of it I confess I cannot tell.

I would repeat the words that the plaintiff's counsel used: they say it is absurdly drawn, it was unduly put upon the Duke. it was done without his perusing it; it was contrary to his common intention, before and after the sealing of it. It must be admitted that there was deliberation, and consideration, and intention enough proved to make it a good deed at law, otherwise there would not have been a verdict for it: but it should seem there was not enough of these in equity, and the want of this is what they call surprise, and that must avoid this deed in equity.

But I confess I am not satisfied that there was any surprise in this case in any thing: the Duke at the time of making this deed was under no force, no restraint, no false information, as I observe, no nor any solicitation from my Lord of Bath at all: he was in his own house at his full liberty, he was in very good company; for I take it for granted, (as I shall insist further by and by) that Sir William Jones was by at the execution of this deed, and a witness to it; the Duke was under no sickness, no weakness: and I must take notice of one proof more which was mentioned, he had not been drinking, but was in very sober company. This appears to be the condition in which the Duke was at the sealing of the deed in question.

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But let us consider what are the particulars of surprise, that they who oppose this deed insist upon; I think they are reducible to these three. There was a want of collateral circumstances that use to attend the execution of deeds, made with good deliberation and without surprise: then there are some observations made upon the wording of this deed, which argue a surprise; and then they say it must be obtained surreptitiously, because it is contrary to his constant intentions, and all the course of his actions as well before as after that time.

First they say there is a want of collateral circumstances that are to attend the executions of deeds made with good deliberation, and without surprise, and that appears in these particulars.

First, it doth not appear who drew this deed: it is certain, they say, that it could not be Sir William Jones, and I think so too: they observe, and with very good reason, that he saying, I approve of this proviso, doth prove that he did only concern himself with

the proviso and did apply himself singly to that, and not manage the body of the deed.

Then it doth not appear that the draft of this deed was read, or the deed subsigned, or countersigned by counsel, as was the Duke's usual method; nor was there any counterpart of the deed: whereas to the will of '87, it was carefully drawn and made, and three parts of it prepared, and then there were very great persons concerned as trustees in this deed, and yet several of them knew nothing of it.

To this I must acknowledge, that the objection is for the most part true; but how far it is an objection we shall consider further by and by.

First, for the want of instructions about the drawing this deed, this is now above ten years before it comes in question; and such instructions there might have been, but in length of time lost or laid aside; and when once a deed is actually made, great persons, as well as lesser ones, are careless of the preparations of such deeds: the deed binds the estate, and if that be carefully kept, there may easily be a negligence as to the rest.

I did observe before, that though the particular limitations in the first will and this deed do differ, yet both deed and will do agree in substance to settle the bulk of the estate to my Lord of Bath. It is likewise observable, that there is a strong proof Sir Thomas Stringer drew this deed, for his hand is interlined in every sheet of the draft, and as I do remember his son writ it. Sir Thomas Stringer was at that time my Lord Duke's counsel; and I confess there have been reported several things about this matter from his mouth, which because they are very various and inconsistent, I wish he had been alive, that he might have set all right; but as the matter now stands here, it has rendered him very doubtful in the case.

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I confess I do believe Sir William Jones had too little patience (give me leave to say so) and too much skill to make such a deed; I speak as to the art and skill of framing it; therefore I conceive he did not, but Sir Thomas Stringer did.

As to the not reading of the deed to the Duke, which the defendant's counsel do object, neither was the will of '87 read to the Duke at the time of his sealing and publishing it: so far it is true, that after it was engrossed and brought to Sir Robert Clayton's, it was not read to the Duke; but the particulars of it he had been acquainted with at the time of the drawing, and so it might be as to the deed too, for any thing appears to the contrary.

That there was no counterpart, and that the trustees were not acquainted with it; the answer is, that the Duke did intend it as a secret, and therefore the less notice was to be taken of it; and the Duke intending mainly by it an advantage to my Lord of Bath, it was thought fit to be concealed, for some reasons, from the Dutchess.

But after all, I know no such rule in equity; I am sure none of the precedents that I have seen come near it; that where there is a deed for the making of which no instructions are found, no proof of its being read to the party at its execution, no counterpart, or

the trustees not acquainted with it, that these are sufficient grounds to set such a deed aside in equity : I do not think any of the precedents, or all of them together (and I am sure I have read them all) will amount to prove any such thing.

The second matter to make out the surprise, is some considerations taken out of the bowels of the deed itself, several improprieties of expression, as (in part of dower) and (in full of dower) which are not phrases that look like the act of a lawyer, one well skilled in the property of the law dialect : it doth also misrecite the will of '75, that is particularly as to the lands given to the Dutchess, that they are given for life, when it was only during her widowhood : the lands are said to be given to Mr. Greenville, as if he were immediate devisee, whereas it is a devise to him in remainder after a limitation to the Duke in tail.

But certainly improprieties of expressions and misrecitals in deeds, are too slight acts to avoid deeds so made, so attested, so proved, as this deed in question has been : they are rather indeed flaws and objections that go to the manner and form, than the substance, and show rather want of art in the counsel that drew it, than want of honesty and integrity in the deed itself : besides that, a devise to one for her widowhood, is a devise for life in one sense, and common parlante, though it be defeasable ; and a devise to one in remainder, is a devise to him, though not an immediate one.

Improprieties of expression and misrecitals, are too slight acts to avoid deeds which are well proved.

Another observation out of the deed itself is, that here are estates limited to the Duke's younger sons out of lands which he had no power to create or carve such estates out of, they being settled before upon his marriage on the eldest son ; and that is true ; it is so, as to the lands called Norton Disney : but there are other lands not comprised in the settlement, and all the rest that were new purchased, were in his power to settle as he pleased.

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But the great objection out of the deed is this, that this deed doth in several places declare itself to be made to confirm and corroborate the will in '75. How comes it then to pass, that it should differ from it in all the limitations, except one ? And that is in the draft of my Lord of Bath's own writing ; and that part of the estate is by the deed to come to the Lord of Bath, upon failure of the Duke's issue male only, so that his daughters are wholly debarred.

To this I say, what they object, (that there is rather a contradiction than a confirmation of the will) is true ; I am not satisfied I assure you in that which the defendants say to it, that the will is mentioned only as to preventing the descent. It is first mentioned there, but I think it goes through, and is repeated more than once ; but that which I would observe is this, that this deed does confirm the will in the main and substantial part of it, the settling the bulk of the estate upon my Lord of Bath.

Besides, the expression of the deed is not only for confirming the will in '75, but also to the settling of the lands to the uses after declared ; and if it do not confirm every limitation, yet it doth in the substantial settlement of the estate.

It was further said, that the only limitation which agrees with the will, is that which is in the draft of my Lord of Bath's hand-writing, where lands are limited to my Lord of Bath, after failure of issue male, with exclusion of the daughters, which, the plaintiffs say, it cannot possibly be imagined the Duke ever intended to do. But I must mention what answer the defendants give to it. They say the Duke had then 15,000*l.* a year : and he makes an intercession to the king to bestow the honour of Albemarle upon the Earl of Bath ; and that it might not go alone, he limits 3000*l.* a year upon his failing of issue male ; so that the honour should come to the Earl, and there was enough left for daughters. Now if their valuation of the Duke's estate be right (which truly I know not) it is some answer why some part should be given to the Earl only after the failure of issue male.

But then I would observe too, the deed by this obligation doth confirm the will of '75, and that will also affirm the deed : if the will of '75 were once well, as I see no colour to the contrary, then I am sure all these objections from the Duke's contrary intentions are all answered, that he never intended to give him his estate, for if they admit that the will was once the true will of the Duke of Albemarle, then there was an apparent intention in the Duke of Albemarle to give the Earl of Bath the bulk of his estate if he died without issue.

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Now as to the variations in the limitations of the deed from those in the will, I think truly it stands indifferent to one side or other. For here was the distance of six years between them, and the Duke might alter his mind ; it might be one way one time, and another time another ; he might alter his mind as to his daughters, he might after so many years despair of issue ; and so not mind the making any provision for them, he might change his mind as to his other kindred, and therefore might in these particulars vary from the will of '75.

But I would still have this observed, that in substance they do agree ; he doth preserve the same favour and good intention for my Lord of Bath, to give him his estate as his nearest kinsman : if then these limitations in the deed were pursuant and agreeable to the Duke's then mind, it is no matter if there be any such variations or alterations from what was in the will ; and that it was agreeable to his mind then, I shall by and by take notice of some things that occur in this case, and which seem to satisfy me in it that this was his intent. For I did observe that one thing they insisted upon, to show that it was by surprise, was, that this was contrary to the intentions of both the Duke of Albemarle, and the constant series of purposes in the family, and they undertake to give instances of it.

The defendant's counsel say, that his intention was to give his estate to the Earl of Bath, who was his near kinsman ; to whom he had very great obligations ; that my Lord of Bath was concerned in that great action of restoring the royal family, which was the raising of his own ; that he was a constant friend of Duke George, and his son's chief counsellor and advisor ; and that the family were under great obligations, is and must be admitted

both from what is in the deed expressed, and what is otherwise proved.

But the plaintiffs say no, they had no such intention, neither one or other of them, and particularly Duke Christopher had none, neither before the making of this deed nor after. Duke George makes his will in June 1665, wherein he gives all his real and personal estate to his son, and nothing at all to my Lord of Bath. I did look into the will, which is very short, and there is nothing given to any body but his son, that is the whole of the will; then in the year 1669, is the settlement made by Duke George upon his son's marriage, and there is nothing settled upon my Lord of Bath, not so much as a remote remainder. In '73 Duke Christopher makes his will, and therein gives great legacies to the Dutchess, but not to the Earl of Bath.

The plaintiff's suggestions.

These are instances before this will and deed, but the answers given them are these, which makes me not satisfied with the plaintiff's objections or proofs of his never intending to give my Lord of Bath his estate.

First, as I said, Duke George's will is very short, and takes notice of nobody but his son; and as he gives nothing in it to my Lord of Bath, so neither doth he to any body else, and that very devise is void, because it was to the son and heir, to whom it would without that have descended; and it signifies very little to their purpose, being in the same year with King Charles's sign manual at his request to promise the Earl the dukedom upon failure of issue male.

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Answered.

As to the marriage settlement in 1669, there is indeed nothing settled on the Earl of Bath, so much as in remainder; but in such settlements men usually do provide only for the issue of that marriage, and so leave the disposition of remainders to subsequent settlements.

As to the will of Duke Christopher in 1673, at that time they say he was but a minor of twenty years of age, and it was only to dispose of his personal estate; for as to his lands, if he had made any devise of them, it had been void, and the personal estate was at that time about 60,000*l*. But within a year or two after that, when he came of age, is the will of '75 made, and there is a mighty liberal gift made to my Lord of Bath; and pursuant to his father's desire, and King Charles his privy seal, doth he make that request for the dukedom for my Lord of Bath. And it must be observed upon all these things, that as there is nothing given to my Lord of Bath in Duke George's will and settlement, nor in Duke Christopher's will in 1673; so nor is there any lands in either of them, nor in the will of 1675, or deed of '81, given to Thomas Monk, the father of the now plaintiffs; so that that objection is much stronger against them than against my Lord of Bath.

Now I do not find any proof of a provocation or cause given by my Lord of Bath, to make the Duke totally change from this intention, to give him the greatest part of his estate, and put him quite out of his favour, nor doth it appear he was so; here were several letters read, there have been copies of them brought us,

and I have looked upon them; against these letters, it has been observed, that there is no notice taken in any of them of this deed, but there is some of the will of 1687, while the Duke was in Jamaica about the death of Colonel Monk.

[80] I confess, I cannot say there is any one letter that speaks of this deed, by the name of a deed; but there is one or two that have an aspect upon it, and very near respect unto it, and cannot refer to any thing else, particularly that which was written relating to my Lord Lansdown, when he was going to travel, and another about his marriage, wherein he takes notice how much he was concerned in him, even next to his father himself, as he very well knew; and that he wrote so much about him for reasons best known to the Earl himself; this seems to point at the same conveyance, and aims at this deed, to my thinking, directly.

They have made another objection, that the Duke never intended to leave any part of his estate to Sir Thomas Glarges, because he was under the Duke's displeasure, upon account of something he took ill from him, but that receives an easy answer; what is limited to him is but a remainder, and that of no great estate neither; besides that, the evidence of the Duke's being displeased with Sir Thomas, is but a hearing by a third hand; but I find no displeasure proved at all that was conceived by the Duke against my Lord of Bath to the last: come we then to the time of making this deed, and let us see whether the Duke did really intend what the words of this deed do import, and that, I think, is made evident by proofs that have not been answered or contradicted; the deed takes notice of the very great and many acts of friendship and kindness received by him and by his family from my Lord of Bath; and it is proved, the Duke declared it ought never to be forgotten, nor could he ever make him sufficient amends. It should seem he had procured his father's garter for him, when he might have had it himself; he thereupon tells Mr. Prideaux that he was settling, or had settled, his estate upon my Lord of Bath, which must be much about the same time that this deed was made. One of the witnesses to the deed says, at the sealing of it, he wished he could have done more for him.

But to me, one of the clearest evidences of the Duke's intention to do this for my Lord of Bath, and that it was no surprise upon him, is the presence of Sir William Jones, at the execution of this deed; for I do take it upon the proofs, it is most evident that he was then present; and I will tell you what the evidence of it is: Mr. Vivian says, he was often used as counsel for the Duke of Albemarle, and principally relied upon; and this Vivian happens to be one of the surviving witnesses, and he positively says, Sir William Jones was there, and a witness to the deed; so says Mr. Strode, who knew him very well; and the third says, there was a great lawyer there, though he doth not pretend to know him, it is Clark: Mr. Hubblethwait says he believes the name endorsed is Sir William's hand-writing, and no better witness could there possibly be for that purpose than he; nor could there be greater evidence than those multitudes of instruments

that were produced in court, whereby to my apprehension it did appear plainly that the characters did very well agree.

Now, if Sir William Jones was there at the sealing of this deed, I think I need say no more upon this point; he was a gentleman very well known to be both of great ability and integrity, and reputation; and he would never have given up all his honour and reputation, and the quiet of his own conscience, to make one in a confederacy of circumventing this noble Duke, or defrauding any one of his estate, and therefore believing him first to be present, which I really do, I cannot but conclude that it was really and bona fide done without fraud or surprise. Besides this evidence, there are several discourses also that have been proved, wherein the Duke hath declared both his intention, and that the thing was done, which sheweth he was not surprised into it; I name Mr. Crofts in particular, who must be admitted to be a good witness, being one of the three witnesses to the will of 1687: and he says the Duke of Albemarle told him the Earl of Bath was to succeed to his estate.

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It is indeed objected upon this head, what needed then all this privacy be used? why should the Duke conceal it from the Dutchess his lady, to whom he had been so kind in it? why from the Duke of Newcastle and the other trustees, persons of quality and honour? They say it could not be from any dissatisfaction the Duke had with the Dutchess, for they always agreed very well together, and they have read the testimony of my Lord Carmarthen, who says that he never observed a couple to live better together, or any woman to carry it better towards a husband than the Dutchess, and they have produced you some letters from the Duke to her, which show great fondness and affection to her.

Truly, in the first place, I do not know why any reason should be expected to be given why he useth privacy in any action he doth, sure he may, or he may not, at his pleasure; there may be private circumstances that may induce him (and that with very good reason) to use more or less privacy in the affairs he transacts. But besides this, they bring you in proofs that I cannot but mention, that the Dutchess had conceived a displeasure, though it be not known for what reason, against the Earl of Bath; that the Duke was uneasy under her importunities to do what he had no mind to, and that was the cause of his drinking so hard to divert himself; the Duke was apprehensive she would pursue her displeasure against my Lord, and he would have but an unquiet life if she came to the knowledge of this settlement, at least till she had prevailed with him to alter it, which he resolved not to do.

Now it may be (I speak it with all the due respect to my Lord Carmarthen's evidence) that the public carriage might be plausible, especially in the presence of one of his quality, and yet there might be some latent displeasure which might break out amongst themselves whenever my Lord of Bath came in competition with those for whom my Lady Dutchess had more affection, and would make use of her interest in the Duke about it, and the counsel for the plaintiffs could very hardly maintain but that the

Duke had once an intention that my Lord of Bath should have his estate, till, say they, he came to have the knowledge of one of his own name whom he designed to prefer and provide for.

If so, then I am sure the first time that any such change of mind doth appear, is by this will of '87 ; for before that they do not pretend to any thing done for Colonel Monk, and that will serve to answer that objection that this deed of 1681 was against the Duke's constant intent before and at that time.

It is true, he doth call Colonel Monk cousin in this will of 1687 : whether he was a-kin to him or no, doth not appear in proof at all in the case, but on the contrary it is in proof that my Lord of Bath is really near a-kin to him ; and it was as much his intent when he made this deed, to keep up his title and honour in my Lord of Bath's family, as can be imagined or conceived.

Objection.

As to the will of 1687, that doth declare his last intention, and that they say is most probable that my Lord of Bath should not have the estate, but Colonel Monk should ; for it was a will made with great deliberation, being five or six months preparing, great advice about the drawing of it taken, particular instructions by himself given, several copies made and left with several people. On the other side they observe the distance of time, six months between the preparation and execution, which is not an argument that he was very forward to do it ; but rather an argument that he was very unwilling to do it, and the very time of executing it was when he was very uneasy about his being forced to execute the conveyances of Dalby and Broughton to my Lord Jeffries ; his mind was then disturbed ; but if he had a real intention and purpose to revoke the deed, he had an opportunity to get this revocation done in their presence, and afterwards he might easily have got a third peer.

Answer.

The great objection is, what should the Duke take all this pains for, and this care and thought about the preparations for this will, so carefully execute it, deliver the several parts to several persons, and all for nothing ? I do admit it is a great objection, and I think there is but one answer to it, but that is a pretty plain and strong one : why was all that care and thought used about the will of 1675, and the deed of '81 ? did he intend nothing by it then ? and if he did then intend something, what provocation, what demerit, what was done or left undone by my Lord of Bath to change the Duke's mind, that whereas before he gave him all his estate, now he should give him never a farthing ? truly I think it was the Duke's intent to do this last act only for his own case ; he knew the Dutchess had a displeasure to my Lord of Bath, and therefore he himself designing to express his kindness to my Lord of Bath, would make such a deed, and put it out of his own power to alter it upon any slight attempts, or unless he should have reason to change his mind towards him upon extraordinary occasions and circumstances ; so by not complying with these extraordinary terms in the power, he could preserve his purpose towards my Lord of Bath, notwithstanding any attacks upon him, and yet by such a will as this he could pacify the importunities

of the Dutchess, who not knowing of the deed, did acquiesce in a settlement by will, so things might pass easily, and he not being disturbed by any bickerings or misunderstandings between the Dutchess and my Lord of Bath.

And truly it appears by what Doctor Benwick saith, that the Duke was to buy his peace at home by such a compliance, for he was told the Dutchess would be very bad as to her distemper, if her desires were not answered; and in Jamaica there is proof of a very great uneasiness the Duke was under, the chamber was locked up, and persons that came to him were forced to come in at the windows. I have been long upon this head of surprise, because it was so much laboured by the counsel for the plaintiffs; but after all this I think it is but a short point; here is a deed made in '81, fully proved and found to be a good and true deed, by a verdict at law, and as such, is a good and sufficient conveyance of the land at law: and that is made to my Lord of Bath, pursuant (as to the ground and substance of it) to the will of '75; though all the particular limitations do not agree; here is no fraud, no falsehood proved, no practice that appears at all upon the Duke to obtain it. But here is the want of a counterpart and want of notice to the trustees, and these must be matters to make out a surprise to set aside this deed.

I confess that I am at a very great loss upon what ground of reason that rule is founded, and am totally to seek for a precedent to be guided by in the cases, and therefore I cannot but be of opinion that it cannot be set aside in a court of equity upon that point.

The next thing is that of concealment; they say that this deed was secreted and concealed by my Lord of Bath from the Duke of Albemarle, that he might not know the particular circumstances of his power so as to pursue them when he had a purpose to execute it; and this they ground upon a matter of fact, which they say is testified by one of the witnesses to the deed; that the deed at the time of the execution was delivered to the Earl of Bath, and so they say it was kept by him, and the particulars of the power were forgot by the Duke, and so he was not informed what he ought to do nor enabled to make a present revocation.

They say, likewise, this deed was concealed and not discovered upon the sale of part of the estate conveyed in it to my Lord Jefferies, and leases and annuities. But that which they insist upon (as I by my notes take it) is a passage in my Lord of Bath's answer to their bill, that about the year 1686 my Lord Duke sent to the Earl for his will, in order to make a new settlement of his estate, and this was just before he made the will of '87.

Now truly I think it may have this short and plain answer; the Duke, if he had a mind to revoke this settlement, had more need of the deed than the will; he might revoke the will without looking into it, by making a subsequent will; but he could not revoke the deed, because he was by the proviso circumscribed to the observance of such and such circumstances; say they those circumstances the Duke might be apt enough to forget, and then when he knew the Duke's purpose to alter the settlement of his estate,

Want of a counterpart, and want of notice to the trustees, no cause to set aside a deed in equity.

The 2d head and answer.

my Lord of Bath should have been so ingenious as to have sent the deed, or have acquainted him with the purport of it, and should have considered that the Duke did mostly need that to effect his purpose, more than the will to revoke, that he might observe the statutes of frauds and perjuries, required by three witnesses to make a good disposition of lands by a will, and without much ado that might be complied with : but yet all the while this power not being observed, all his counsel, by subtile advice, told him would signify nothing, therefore he would not discover that, and not doing it, it must be a fraudulent concealment in him sufficient to set aside this deed.

Where a man endeavours to inform himself of his own powers in order to revoke a settlement, and is hindered from coming to the knowledge thereof, he ought to be relieved.

They say, it is no objection, that this was not a fraudulent conveyance in its creation, for every man shall be relieved against that which being by fraud concealed from him, he could not make such reasonable provision against as, if he had known of it, he might have done. Truly I do think this is the best ground of equity that has as yet been offered in this case, and were it not grounded upon facts, which in truth upon the proofs are quite otherwise, I should think it were a good ground for relief, for wheresoever a man doth endeavour to inform himself of the circumstances of his own power and condition in order to revoke such a settlement, where he has a power so to do, and is hindered from coming at the knowledge of them, and especially by that person whose interest is to prevent the revocation, he ought to be relieved in such case; for it is against good conscience that any man should profit by any such subtile sinister practices; therefore I say the objection were good, if the facts were true?

But alas, it is founded in this case upon presumption merely : It doth not appear that the Duke was desirous or needed to be informed at all in the matter, or that he did really intend a revocation, we do not hear any proof that he did ask or speak to any counsel about it; nor is it true in fact that the Duke should expect the deed out of my Lord of Bath's hands, nor indeed could he expect any such thing, for I take it, it stands plain in proof, thus :

My Lord of Bath says in his answer, that the deed was delivered to, and kept by the Duke; they say that answer of his, being a defendant, is not to be regarded, for it is replied to generally, and so the facts not acknowledged any further than they are proved. But to that I say, the plaintiff must prove that this deed was in my Lord of Bath's hands; they say Aleman proves it, who says it was delivered into the Earl's hands : this was looked upon as so material a point in this case, that the deposition was called for to be reviewed; and upon reading it again, it was plain it must be understood of the delivery of the deed only to execute it and make it a good deed, not a delivery into his custody.

Nay, there is a farther strong evidence, that it was in my Lord Duke's hands, and not in my Lord Bath's; for sir Thomas Stringer doth a little before the Duke went beyond sea, make an abstract of it, and delivers it to his man to make a copy of; and then after the Duke's death both deed and will were produced under one cover, (but it is plain the will was delivered to the duke.) This

answers it, and agreeth to what my Lord of Bath said in his answer, that they were both delivered to him by the Duke a little before his going to Jamaica, under that cover, and sealed with the Duke's own seal, and so they are found. And truly if it were but doubtful, whether it were in the one hand or the other, we must not determine that it was in my Lord of Bath's hand, or convict him or any man of fraud where the evidence is doubtful, it ought to be proved, and plainly proved; for fraud is a thing odious, and never to be intended or presumed.

But the truth was, this deed was concealed not from the Duke, but from the Dutchess, that she or her counsel should not get at it to procure a revocation.

As for the case of Charles Clare that was mentioned, it doth not in any sort come up to this case; he had lent money upon a statute, afterwards money is lent upon a mortgage of the lands liable to that statute; he engrosseth the mortgage, and never discovereth the statute, the lands were not worth more than the mortgage-money; and by reason of this concealment, it was adjudged fraud in him, and he should have no benefit of his statute against the mortgagee. Here was a knowledge proved in the case, which is not in my Lord of Bath's, that the Duke would revoke; and yet I must needs say, and I appeal to those gentlemen that usually attend at this bar, whether they did not think it a hard case.

And as to the case of Raw and Pott, besides that it was a case between a younger and an elder brother, and so might have a better ground or handle for equity, yet I think it was fully decreed, because the party knew it and concealed it on purpose, and encouraged the thing: for when he was asked, why he did not discover it? then he answered, if he had, then there would have been a fine levied, and a recovery suffered, and then he knew all would have been well enough; but there is no such matter as knowledge, or the like, here.

The next head of objections is that of a revocation in equity; and for that the first thing insisted upon is this; they would have the deed of '81 to be depending upon the will of '75, it was ancillary, it leaned upon it, and therefore this will of '87 revoking the will of '75, revokes likewise the deed of '81: and for this they did cite two cases out of Dyer, the first is fol. 49. 6. A man makes a feoffment to perform his last will, and this will is annexed to the charter of feoffment, and a livery of seisin is made; accordingly it was adjudged that he might alter and revoke that will, though it took effect by the livery; for that doth not alter the nature of a will, which is always revocable by the last will; but doth that revoke the deed too? no certainly, the deed stood good; and there is nothing to the contrary appears in that book.

The other case is Dyer 314. 6. a man by deed indented declares, that whereas he had suffered a common recovery, to the intent to perform his will, touching the disposition of his lands, he wills so and so; and whether he could, during his life, alter the uses in this indenture, was the question; and it is held he might: for this indenture is *quasi* a will which is changeable: I will go further

Fraud is a thing odious, and never to be intended, or presumed, but plainly proved.

Clare's case.

The 3d head and answer.

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A feoffment depending on a will may be revoked by revoking the will, though livery of seisin was made.

The like also of uses limited in an indenture, to the intent to perform his will.

than that, I say it was a will, or it was nothing; for though it were in form of an indenture between several parties, yet when he says, he wills so and so, after he had recited a power to declare by will, this must be taken for a will, or it is no execution of the power; for when a man suffers a recovery, or makes a conveyance to me by his last will, he hath two interests in it; he may dispose of it as owner, or by way of direction: if he will dispose of it by way of direction, as this was, he must follow the method prescribed, and that must be by will; and so this must be a will, or no execution of his power. But what is that to this purpose, that a will, which a deed is made to confirm, being revoked, that shall revoke the deed too? sure that is no consequence, nor hath any ground upon this case.

In revocations all circumstances must be observed, or the power not well executed.

But then, say they, here is a revocation, and that a revocation in equity; for though it be a good deed in law, yet there is such a contrary disposition by this will, as must revoke it, being revocable according to the power. Indeed here is not the number of witnesses required, nor the quality, nor a tender of the money, and powers of revocation; for it is natural equity, that he who is owner of an estate, should dispose of it as he pleaseth. But there is another rule of law that is as certain as any other, that all circumstances must be observed, or the power not well executed; and that is Scroop's case, and other cases that have been mentioned: and though the law will go as far as it can to expound the circumstances, as a performance, yet a performance is necessary.

Yet it seems where there is a deliberate intent to make a new settlement, and a man goes as far as he can, equity shall supply.

The foundation for this revocation in equity, which the plaintiffs go upon, is this; where there is a deliberate intent to make a new settlement of the estate, and a man goeth as far as he can to make it, there equity shall supply any defect.

First, I must deny that in this case the Duke of Albemarle hath done all that he could do; for he thought six witnesses necessary to the will of 1675, and six witnesses to the deed of '81, and so provides in this power for revocation, besides other circumstances, and here are only three witnesses to this will.

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Neither is this a proper settlement of a family, for it doth not appear that Mr. Monk, who is mainly taken care of in this last will, was any kin to the family at all: nay, it should seem the duke was not spontaneous about it, for he would have the Dutchess pay the counsel's fees, as for her business, when he came to execute it, it was not a place that he came to for that purpose, but upon quite another affair; he would have put it off to another time; he would have avoided it, it was done in a hurry, and before witnesses prepared for that very occasion, and brought from Newcastle House; and therefore it is not so much his intent and firm last purpose.

On the other hand they oppose this argument thus; that the Duke did at the same time write to my Lord of Bath that his purposes towards him were unalterable; and what his meaning in that should be, unless his purpose not to revoke this deed and settlement, truly I cannot tell; he left the keys of all his evidences with him when he went away; Crofts was ordered to deliver

them to the Earl as chiefly concerned, if he should miscarry; he trusts him with the chief management of his affairs, directs him to be advised with upon all occasions, as he used to do himself before, and so is the same still towards him in all respects as ever he was.

I do not find in any of the plaintiff's proofs that there is any cause shown for altering this mind of my Lord Duke's, if he had not himself declared it so to be unalterable; there was no provocation on the one side, or increase of merit on the other side, why he should change from his kindness so grounded towards the nearest relation of his blood, to entertain a stranger to whom he had never a thought of giving any thing before; it is hard to think that my Lord of Bath, Sir Walter Clarges, Dr. Greenville, and even the Dutchess herself, should continue the same, and the Duke should not; I find no evidence of it, nor can tell any reason for it, and without reason I cannot be induced to give my opinion against a deed really, deliberately, intentionally made, upon only the single act of this will, testifying so great and total a change; surely if any such thing had been meant, it was strange he should take no notice of this solemn will and deed made before, and ask advice whether it were not fit to revoke or look into it.

To my thinking, the Duke hath in effect declared, that this will in 1687, should be taken for a will as obtained by surprise, for he binds himself by this proviso only to revoke in such and such a way to prevent surprise: we then find there a will that wants these circumstances required in the proviso, and then we must take it to be what he intended to fence himself against; and nothing doth reconcile the Duke to himself in this matter, but that he was apprehensive he should be drawn to do something that was against his mind, and therefore he doth fence himself with this proviso against all such attempts.

The will and the deed do both provide largely for the Dutchess, but whether the will doth it so liberally as the deed doth, I cannot tell; they did talk as if there was 8 or 4000*l.* difference: I cannot tell what as to the value it may be; but I am sure in this will there is no provision made for my lord of Bath at all, and there is none for Mr. Monk, in the deed, or any other thing before this last will.

I must crave leave to differ from the counsel for the plaintiff in what they take to be a ground for a revocation in equity, that the Duke had forgotten this deed; I am not satisfied that upon that ground only this court should relieve against it: and my reason is this; suppose his intention to revoke do appear, it ought to be in such a manner as the law requires, and pursuing such circumstances as he has put upon himself, because here is a voluntary conveyance on both sides; and where there are two voluntary conveyances, he that hath the advantage at law ought to keep it. And so the resolution was in **Fry and Porter's case*: and I take it to be the standing rule in equity; for what shall turn the scale: shall the defendant urge any thing of merit? that cannot be in this case, but in the eye of the law they are both equal under the consideration of the court, and in *pari gradu*; and indeed

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Where there are two voluntary conveyances, he that hath the advantage at law, ought to keep it.

** Cases in Chancery, 1part, 188, & 1 Ventris, 199.*

if it should be otherwise, what would become of circumstances in powers of revocation, by which men shackle and circumscribe themselves with very good reason at their creation, if the last will alone shall set aside all?

Objection.

It is objected, that it was always the Duke's solemn intent to prevent the dishonourable descent of his estate upon his right heir at law, who sprung from a regicide, and to prevent a surprise by a sudden surreptitious will; and both these ends are attained by the solemn deliberate preparation for his will, and the disposition of his estate to Mr. Mouk, and it is substantially and therefore equitable performed, though not strictly legally.

Answer.

I think there was a further end in this deed, and that was to settle his estate upon a person of honour nearly related to him in blood; and this court cannot take it from him without reflecting on this settlement, and upon him that made it, and upon him for whom it was made; no, nor can it be done, as I take it, without performing the circumstances required and prescribed for that purpose in the proviso, without which I think this court ought not to determine that the intent is performed, or that his mind is changed. And if we shall depart from these limits, I cannot tell where we shall stop. I can set this as a good limit; here is a voluntary conveyance on the one side, and a voluntary conveyance on the other side; the latter conveyance must make it out, that the circumstances requisite are performed, and if not, I think the law must decide it; and there hath been nothing made out, by which, as I conceive, there can be any advance given in a court of equity to determine it otherwise than the law will.

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I shall speak but very little on the other head. It is objected and asked, whether there should be no relief in any case where there is a defect in the execution of the power. I think that would be very hard on the other side, and it would be convenient relief should be given in these cases.

Fourth head.
In what cases
a defect of the
execution of
the power
may be re-
lieved.

First, for a purchaser. I speak not now of a purchaser for a valuable consideration without notice, for that is helped already by the statute, and so where there is any fraud, or the party is guilty of any deceit or falsehood, whereby a man is prevented from executing his power, though he never so much intended or desired it.

But there is no such thing here, and the plaintiff's counsel were wiser men than down-right to call this fraud, only they style it surprise and circumvention.

I think also it may be fit for this court to give relief where there is a foreign consideration, as consideration for payment of debts, or providing for younger children; as where a man makes a conveyance or makes a will, and chargeth his lands over, when he has such a power, for the payment of his debts, and the circumstances of the power, are not exactly observed, there shall be relief in equity for the sake of the matter; payment of debts is a most conscientious thing, and fit for a court of conscience to take care of, and see performed; and providing for children is a thing of the same nature, they are looked upon as creditors; and I think this is reasonable, and the precedents have all gone that way.

Payment of
debts a most
conscientious
thing.

The statute of 32 Hen. VIII. which gives a man power to devise laws by will in writing, recites it as reasonable, that a man should dispose of his estate to pay his debts, and provide for his children, but goeth no further; those were wise and prudent considerations upon which the law did enlarge a man's power of disposing of his estate; but there is nothing of either of these in this case; every one will say he is not a man of good conscience that will not pay his debts, or provide for his children; but will any man say that my Lord Duke had not been a man of good conscience if he had not given this estate to Mr. Monk or to my Lord of Bath either: he might lawfully and conscientiously give it to the one or the other; but there is no consideration of equity appearing why he should be obliged to it, or to take it from the one to give it to the other, he might use his liberty according to circumstances and his own power.

32 H. VIII. c.
1. sec. 1.

Another ground of relief in equity is accident, or an impossibility of complying with the circumstances when he hath a plain intention to do it. I agree it is so; but then he might do all that he can, as the case that was put, of a man's being obliged to pay or tender money at such a place, and he falls sick, or lame, or bed-ridden, that he cannot go thither, and it is tendered by another by his order, or at another place; this being the act of God, I think it would be a good performance of the condition, and that I think is the best answer that can be given for the decree in Popham's case.

But now here when the Duke was informed of his power, or might have been, and neglected all, and performed nothing, shall this court supply these defects, and want of performance? Sure they may as well supply all the rest, that there should be no hand, no seal, and for aught I know, no will or deed, but only a parole declaration.

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There is one thing that I should properly mention last under this head; they object it is not said, that it should be in the presence of six witnesses altogether: now it was in the presence of three witnesses here in England, and three more in Jamaica; and so here are six witnesses, though not all at once, and there was no peer to be had as a witness in Jamaica; so there is an accident rendering it impossible to have any such, and therefore equity will relieve against such an impossibility.

I do agree, if the Duke had gone about directly to make and publish his will in Jamaica, with an intention declared to revoke this deed, and had had six witnesses to this his act and plain intention, there being no peer to be had there, it should have been a good revocation; as in the case mentioned by the counsel of Kibbett and Lee, in my Lord Hobart, 312. Indeed, if the power were limited to be executed in the presence of three subsidy-men, it is said in the book that they must be averred to be subsidy-men, but yet I take it now that old way of subsidies is out of use; three substantial men that would have been subsidy-men: if that were the present way of taring, it would be enough, for none such would be had, nor could there be any peer in this case that is put.

But to consider the case and proofs as to Jamaica, what it

amounts to: I would fain know how it appears, that it was the same will that he executed at Sir Robert Clayton's: the Duke only said, Doctor, this is my will; perhaps it was the same, perhaps it was not: but how comes his writing, his hand and sealing in the presence of three witness, and declaring it after to be his will, (to make the most of it) in the presence of three more, to be an execution in the presence of six witnesses; but beyond all this, here is no proof that he did intend to publish this as his will it is only a private saying of his on the by, when he saw it among other papers which then he showed Dr. Sloan; he was not then solemnly making his will, or executing his power; he doth not so much as bid them take notice that he declared that to be his will, or any thing to make them remember it afterwards: so that I take it, it signifies nothing as to this matter.

Cases and precedents answered.

I would trouble your Lordship no longer, for I have been long enough already; I am loth to meddle with the cases and precedents, because that may take up too much of your time; but because the precedents have been brought me, I must say something to them, to show that I have read them; I will therefore open some of them, such as I think come nearest the case.

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Hob. 312.

They say, the common law goeth as far in relieving upon cases of powers of revocations, as appears by Kibbet and Lee's case, that I mentioned but now; where a will is declared to be a writing; so the case of Thorne and Newman's payment in another place than that required in the proviso: in that precedent it is recited, that the endorsement on the back was that the money was paid according to the proviso, and no notice taken of the place; for upon the very reading of the endorsement, the plaintiff was forced to be non-suit; and afterwards that matter was disclosed in equity, that it was in another place than the place in the proviso, but yet no relief against his own acceptance, who was the party privy.

The next case is the case of Guy and Dormer; a man sells his estate, with a power to revoke by any writing, in express words.

Equity follows the law.

Now here they did not help the want of a performance, but the judgment was, the performance was real; besides I cannot allow that to be any argument, that if the law has gone as far as it may, equity shall go further: to me the argument runs quite contrary; equity shall carry it no further, for equity should follow the law.

There were several precedents cited by the plaintiff's counsel; but I confess, upon consideration of them, very few do come up to the case in question; I shall take them as near as I can in order of time.

The first is that of Prince and Green, 40 Eliz. There was a power to make leases intended to be reversed in a conveyance by a covenant to stand seized to uses, and a lease is made accordingly, as a provision for a younger son. This power was not long after Mildmay's case, and the case in Roll's Abr. 1 Part. Tit. chancery 378. But because, says the order, neither the party nor his counsel did then know but such power was warranted by law, though by late judgments they were found to be void, and so it was impossible to them to prevent it, the court did relieve in this

case to make good the lease ; and it is there said that the elder brother, who would avoid the lease, was an unreasonable man, and this was a provision for a younger child, which is not our case, neither the counsel's mistake of the law, nor a provision for a young child.

The next is the 44 Eliz. the case of Ferrers and Tanner ; a man deviseth annuities out of lands to his half-sisters, and gives the land to his half-brother, who makes over his estate to prevent their being seized of the rent in order to distrain, and the court, after some time, and upon sight of a precedent, did relieve the devisees. .

Here I would observe how difficult it was even for this court to do that, for they say, the heir that had the land, did promise the devisor before his death to perform the will, and that has a deceit, otherwise the devisor might, before his death, have done it by a conveyance, or granted the land with a condition to do such an act, or permit such a thing ; and that he did consent afterwards before the Master of Chancery to do it, I will not say but that this court might have declared this payment without these circumstances, nor that these might not make the case somewhat better ; indeed, in the short print of the case in Moor 626. pl. 859, there is no reason but the resolution only.

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The next case is in the year 1655, the case of Hamilton and Maxwell in this court, which in short was upon very good reason, because it was a provision for a younger daughter, and that is agreed on all hands to be a good ground for equity, and he declared that his elder daughter was otherwise sufficiently provided for.

Another case is that of Bowman and Yates, and that is about a covenant for levying a fine for raising a rent out of lands, which was indeed defective at law, but decreed in equity to be paid and satisfied ; but if it be looked into, I think it will not appear very pertinent to this case, it being only to support the intention of an agreement upon marriage : this was 12 Car. II.

The next is the case of Wallis and Grimes, 19 Car. II. which was this : Sir Thomas Grimes the grandfather makes a conveyance in trust for payment of 500*l.* to younger children, the heir makes a mortgage without notice, and this trust is endeavoured to be set up against the mortgagee, but the court would not permit it ; but comes not near our case, for a mortgagee is in the nature of a purchaser.

Ca. in Chancery, 1 part 80.

Then 20 Car. II. was Pitt and Pelham's case in the house of Lords.

V. Cases in Chancery 1 part, 176.

There this court did relieve, because it was a plain intent the land should be sold, and there was only a want of naming the person that should sell, and the law would help that : he that hath the land shall do that office, and he that was next door to a provision for children, it being for nephews.

For the case of Smith and Ashton, besides the answer my brother Powel gave to it, it has also this flat answer to be given, that it was a provision for children ; that was the next case in point of time.

Cases in Ch. 1 part, 263.

Then comes the case of *Brisco and Peters*, 28 Car. II. I have, as carefully as I can, perused that case, but cannot really observe how it is made use of in our case, and it is very much to be considered that it is no rule between two voluntary conveyances how far a voluntary conveyance shall be fraudulent against a purchaser.

The next case is that of *Thwaytes and Dey*, which hath also had a full answer given to it already: it was doubted, whether there was a seal to it; but the court seemed satisfied with that; and all the remaining question was, whether a man making a conveyance and reserving a power to make any other estate, could charge that land with a rent for a younger child, and the court held he might, and I think it a good decree.

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These are the precedents that are made on the plaintiff's side, there are but few brought for the defendant's part, but two that I think are very material; the one is that of *Ward and Booth*, which hath been opened and applied by my brother *Powel*; but I would observe from what he quoted out of the decretal order in that case, that it doth very extraordinarily declare the limits of this court's 'proceedings in such cases as these. Here was not a formal revocation, but a clear and express intention to revoke, that doth not appear in the present case; there should be, I agree, relief in such circumstances, if there were fraud in the party, if there had been any accident to render it impossible to execute the power in all formality; but here is neither fraud nor accident, and therefore, by the reasons and rules in that case, there can be no relief in this case.

voluntary
conveyance a-
gainst a volun-
tary convey-
ance to be tri-
ed at law.

The other is *Arundel and Philpot's case*, and that is so very express an authority for this court's leaving the determination to law, that nothing can be more: there they say, where it is a voluntary conveyance against a voluntary conveyance, you must try and decide the matter at law; and it did fall out in that case, that there was no need of a court of equity to interpose, for upon the trial it did fall out to be proved, that there was a due and legal execution of the power, that there was a tender of the guinea.

As to the matter of the general trust, I need say no more than this, whether that would avail any thing upon a controversy between the legatees and my Lord of Bath, I cannot tell; but I am sure it is not at all as this case now stands. Yet methinks as to a general trust, that it cannot be; for that were to make the Duke use all this solemnity in making this settlement to no purpose, and would render this power of revocation very useless and idle: the use of this power was because he had put the estate out of him both in law and equity; and so there could be no general trust or means to bring it back again without a due execution of the power.

There are but two or three small objections more than I shall but mention, and conclude.

Objection.

First, they say several grants will be avoided if there be no relief against this deed, that is, some leases, some small annuities to servants, and a grant of 100*l.* to the Duke's natural son; this is all. Now whether it is not reasonable to imagine, the Duke

thought that the trusting the Earl with so great a part of his estate, he would have more honour and respect for him than to dispute such trivial matters; and for any leases or contracts, they come within the rule of purchasers, and so the consideration would preserve them. Answer.

Then they say, here is no monument for the Duke, a person of so great quality; but that may be made good out of the personal estate; I am sure it is no objection in point of law. Objection.
Answer.

But the last thing they urge, is, if there be no relief in this case, you put the greatest indignity and reproach upon the Duke that can be imaginable, that he should call Mr. Monk cousin, send for him out of Holland, to leave his will with him, in the will give him so great a share of his estate, desired the king to make him a Baron, and appoint his son to be educated as one that was to make no small figure in the world; that he should send for my Lord Chief Justice Pollexfen to draw his will, make three parts of it, deliver one to the Dutchess of Newcastle, another to colonel Monk, and carry a third with him to Jamaica, and there take public notice of it, and after all this expectation raised in Mr. Monk of a fortune, run him into the charges of an expensive, but what he knew would be a fruitless suit: this, say they, is an inconceivable dishonour to the Duke, to be represented as one that would prevaricate so with the king and the world, and play with the misfortunes of his kinsman, and the rather, because the Duke was a plain sincere-hearted man, and in all this did not pursue his real intentions of kindness to Mr. Monk and his children. Objection.

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Truly, methinks they have just as much to say on the other side: what shall those many declarations of kindness to the Earl before this deed, in this deed, and after this deed by letters, and other things, signifying his care to my Lord of Lansdown as one he was most concerned for next to my Lord of Bath himself, his petitioning the king to confer on him the title of Duke of Albemarle in the case of his failing of issue male, and all this to signify nothing; besides the known kindred, the apparent obligations and merit of my Lord of Bath: sure if all this be considered, the Duke's honour is as much concerned on this side as the other, to approve himself sincere in all these solemn transactions! would he own him as his nearest kinsman, and the most deserving of his blood, and all the while have a secret purpose in the last act of his life to make a will, by which he would set aside all he had professed to do for him, and by leaving this deed and will with him, leave only so much in his hands as should put him into a chargeable suit for nothing? Therefore, upon the whole, I think there is greater reason to conclude that the Duke did not certainly mean to do this last act, as what he would have to stand against so much formerly done the other way; but I rather think the evidence is strong to persuade any one that the making of this last will was to satisfy another purpose, and make his own condition easy at home. Answer.

But my opinion, as to the judicial part of this case, which I thus happen to be of, is the stronger in me, because of the authority of two cases, which I take to be express in point, and those are the cases of Wynne and Roberts, and Fry and Porter. Wynne and
Roberts's,
case, antea.

In the case of Wynne and Roberts, there was proof of a very great surprise upon the man, whereby he was induced to make a will, and to disinherit his child, of whom he was before very fond, and who was married into a very honourable family, and to break a settlement solemnly made before: all this matter was charged in the bill, and proved: but notwithstanding this, the court declared they would give no relief; but if they could expect any, they must go to law, and at last it was ended only by a bill in parliament. The court said, try it at law, a will or no will, and do not expect the chancery should make men's wills, or set them aside, if legally made, especially then not upon bare conjectures and suppositions concerning a man's intentions, to relieve against a solemn act and title found at law.

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Case in Chan.
1 part, 138.
1 Vent. 199.

In Fry and Porter's case, one of the great reasons why the court denied relief there, was, that it was a controversy between two voluntary conveyances; and there that side that had the advantage at law, ought to keep it; and it was without precedent to relieve in any such case.

Chancery not
unlimited and
unbounded by
any rules.

So I say in this case, we have no precedent of relief in any such as this now before us; we must not say this court is unlimited, unbounded, by any rules; it is no doubt limited by precedents and practices of former times, and it is dangerous to extend its authority further: if therefore I err in my opinion in this case, I err with the precedents on my side; and because I have never a one to guide me the other way, the defendants are in possession of a verdict, judgment and title at law, and I can see no ground for equity to relieve the plaintiffs against them.

Conclusion.

Then it being very late, the court put off the delivering the Lord Chief Justice Holt's opinion, and the Lord Keeper's decree till another day.

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Die Veneris 23 Decembris, 1693. In the Court of Chancery, in Westminster-Hall, comes Mountague, & alii versus Comitem Bathoniensem & alios; & c. contra.

Lord Chief Justice Holt.

In this case, wherein the Earl of Mountague, and the Dutchess of Albemarle, and others, are plaintiffs; and my Lord of Bath, and others, defendants, I shall open the case very shortly as it stands upon the two wills and upon the two deeds.

The case.

There was a will made in the year 1675, by Christopher Duke of Albemarle, wherein there is a disposition of several parts of his estate upon his dying without issue to several persons; but the main part and bulk of it is given to my Lord of Bath: and in that will there is mention made of a particular esteem and affection which the Duke bare to my Lord of Bath; that he was the nearest of his kinsmen by his father's side; and that he also

was indebted to him for many great acts of friendship and offices of kindness performed to him and his father. Then there is in that will also an express desire that the title of Duke of Albemarle, by the King's favour, might be conferred upon the Earl of Bath; and that the eldest son of the Earl of Bath, and so the eldest son of the family successively, should be called Lord Monk: so that the names of Albemarle and Monk may, with the King's favour, remain with his estate in the posterity and family of my Lord of Bath, in memory of the late Duke his father and himself.

The estate being so disposed of by his will of '75, there are two deeds made in the year 1681, a lease and a release. The release doth recite this will; but in the recital of it, there are some differences from what is in the will itself, some variations from it. In this deed it is mentioned, that the intent and design of the deed was to dispose of the estate, according as was in the will: and whereas it might be thought strange that the Duke by his last will, which by that deed he doth confirm, and not intend to revoke, should give away his estate from the heir at law; therefore, for the satisfaction of the world, the Duke doth declare the reason which hath been frequently mentioned; and then the deed disposeth of the estate, some to the Greenvils, some to the Clarges, but the main and bulk of the estate he settled upon my Lord of Bath. But in this deed there is a power of revocation, to this effect, that it shall be lawful for the Duke at any time to revoke this deed, upon the tender of a shilling, by writing under hand and seal, in the presence of six witnesses, whereof three to be peers of the realm, and then to limit new uses.

Then he makes his will in the year 1687, and therein he gives his estate in a different manner, that is, the bulk and main of it is given, instead of my Lord of Bath, to Mr. Monk, whom he supposeth to be his kinsman, and desires that the name and title of Baron Monk may, by the King's favour, be bestowed upon him, in case he himself died without issue.

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Now the question is, whether or no this will in '87 hath revoked this deed made in '81 in equity, for there are but three witnesses to this will, and not one of them a peer; so that in law it is very plain it is no revocation at all: it cannot be a good revocation there, because the power is not pursued, the circumstances are not observed; there is neither the tender of a shilling, nor six witnesses, whereof three peers; nay, not only so, but here are but three witnesses in all, and not one of them a peer.

The question.

I am of the same opinion with my Lord Chief Justice of the Common-Pleas, and my brother Powel, that this is no revocation in equity, and that there ought to be no relief had by the devise of the will of '87 against those that claim by the deed of 1681.

These things are to be premised as granted, and not to be questioned.

First, that the will of '75 was a good will, there is no manner of dispute to be made of that.

Things admitted.

Secondly, this deed of release that was made in '81, is a very good deed, and there is no manner of dispute to be made of that neither; for if there had not been a verdict in the case, yet if they

come to have the opinion of a court of equity, touching relief in equity about this deed, it ought to be taken to be a good deed in law, or they were not to come hither for relief against it. And as this deed is admitted to be a good deed, so in this debate all those circumstances that appear in the depositions are to be admitted to be true in this cause. I do not say that they are never hereafter to be controverted, but now upon this debate they are to be admitted true; as,

First, that Sir William Jones his hand is to the perusal and approbation of the proviso, and it is his writing.

Secondly, that he was a witness to the execution of this deed : and,

Thirdly, that this is true which Errington swears about the abstract of this deed made by Sir Thomas Stringer, which being main circumstances about the deed, and controverted, now must be taken for true in the consideration of this cause. And then a third thing that is to be admitted without any contradiction too, is, that this will of '87 is a good will.

The cause standing thus, and all these things being taken for granted, the question I say will be, whether those that claim by this will of '87, can have any relief against those that claim by the deed of '81 ? And I think there ought to be no relief: but those that claim by the deed of '81, have a good title in equity as well as in law.

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Four general
heads in ques-
tion.

I shall not mention any thing of the evidence that hath been given, or insisted upon to support the deed, nor now answer any of the objections made against the truth of it; for I told you first, I take it for granted, that it is a good deed, and a true deed without all dispute. But to the intent I may comprehend all the matters that I think are any way considerable, and fit to be insisted upon, I shall speak to four general heads.

1. First, I shall consider, whether upon the frame and manner of this deed of '81, there may be any ground of relief for the plaintiffs against it.

2. Secondly, whether there appears upon the proofs and depositions in this cause, that there was any undue way or manner of obtaining this deed from the Duke; or any way or contrivance, or management for the contriving it in being afterwards, which may produce a ground of equity for the advantage of the plaintiffs.

3. Thirdly, I shall consider the circumstances and conditions of the parties that are in this cause, those that claim by the deed of '81, and those that claim by the will of '87, and whether upon that account there can be any equity raised in this cause; and,

4. Fourthly, I shall consider the person of the Duke of Albemarle, and the particular circumstances he was under at the time of making this will in '87; and whether by reason of him from whom the estate proceeds, or the circumstance he was under, there will appear any ground of equity in this case.

1. Considera-
tion.

The first consideration I say will be, whether upon the frame and manner of this deed there be any ground of equity for the plaintiffs against it. There were several things under this head that were insisted upon by the counsel for the plaintiffs. As,

First, that this deed of '81, doth partake of the nature of a will, because it recites a will, and it is made to confirm a will, and therefore shall be revocable in a court of equity as a will shall be in a court of law.

Secondly, that it pretends to recite the will of '75, and there are several mistakes in the recital, and very great variations from it.

Thirdly, that there are several dispositions different from those in the will, which it pretends to confirm.

Now for the first, to maintain that when a deed recites a will, and to say itself is made to confirm that will; therefore this deed shall be revocable in its nature in equity, as a will is at law, I must needs say, is a notion that I never heard started before. Therefore, for that I must appeal to you, who are constant practisers and attendants here, whether it be not a notion altogether new. And to me as it is a new notion, so it is very fine, and seems impossible to be supported by any reason, but must produce very strange absurdities. It is not to me to be reconciled with any reason of law or equity, as far as I understand any of either.

For to say that a deed is revocable, because it relates to a will, is first to contradict the nature and essence of a deed; for a deed takes effect immediately upon the sealing and delivery, and is impossible to be altered from what it is, and has in it, or to be revoked by him that made it. But because it relates to a will, it shall be revocable as a will is; that I say is a mere fine-spun strange notion, not at all agreeable to reason.

Next, such a construction and strain as this in equity must overthrow the intention and design of him that made the deed: for when a man has made a will, which is not consummate till his death, and after that makes a deed, and limits the estate in such a manner as it was disposed of by the will: what does this man mean but that those estates which were, or arise by the will upon his decease, shall have immediate effect during his life: and whereas he thought with himself it might not be so convenient to leave his estate wholly to depend upon a will which might so easily be altered, it was his mind and intention that it should be made more firm by a deed, which is more permanent.

Next, it is a mighty strain to make a deed revocable as a will; for then you must first set up against that will which was thereby revoked; for you cannot imagine, but that when a deed is made, though to confirm a will, the estate limited thereby doth arise by the deed, and the will is revoked by the deed. So you set up a will that is no will in law, and that shall control a subsequent deed which destroyed that very will, which is strange and contrary to all rules of law and reason.

There were some cases quoted wherein a deed shall control a will; as Dyer 49, it is said, if a man makes a feoffment to the use of his will, which was annexed at that time to the charter of feoffment, that that will is revocable, notwithstanding there is an express application in the deed to that will itself, and so the uses

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To say a deed that relates to a will, is therefore revocable as a will is, not agreeable to reason.

Where a deed is made to confirm a will, the estate limited thereby doth arise by the deed, and the will is revoked.

arise by the deed, not by the will; and yet though this deed hath relation to the will, that will may be revoked.

This indeed hath the terms put in the case, but in reason is no way applicable to it. When a man makes a feoffment, and annexes his will thereto, there the design is that the estate should arise, not immediately upon the feoffment, but attend upon the will. But if a man make a deed of feoffment, and says it shall be to the use of such persons, and for such estates as in his will, or as he shall give according to the will, there though the will doth mention the names, and limit the estates, the uses do not arise by the will, but by the deed: for though the will be no part of the deed, yet when the deed doth refer to the will, and the will hath limited the estate, it is as much as if all the limitations had been comprised in the deed.

A deed not revocable without a power reserved in the deed itself.

And I take it that a deed is not revocable, because it hath an immediate effect, and can be no otherwise revoked, but according to a power reserved in the deed itself. And that is *Hussey's case*, Moor, 756. A man makes a will, and he makes a feoffment to the uses mentioned in the will, though the will be revoked, as sure it is, yet it is a sufficient declaration to the uses.

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Objection.

It was further urged, for the support of this notion, what is said in *Hobart* in the *Earl of Ormond's case*. The case is put a little short in the book. A man suffers a common recovery to the use of such person and persons, and for such estate and estates, as he should dispose of, and to, in his last will. This was a case in Ireland, and before the statute of uses was made there; and so we must look upon it in England as a case before the 27 H. VIII. and then there being a feoffment made, he remains *cestuy que use* in fee in the mean time, for he hath a power by will to dispose of the use, according as is expressed in the deed. Then he makes a deed in his life-time, and giveth away the inheritance of this use, and afterwards makes his will. Now here is a deed that giveth the inheritance of the use away; and here is a will that doth controul and alter the disposition of this deed. This was the use that was made of this case.

Answer.

Now in answer to that, suppose it were so, this will is but an execution of that power which proceeds from the deed; for when a man makes a feoffment for the use of such persons, and for such estates as he shall limit by his will, it is not the efficacy of the will that disposeth of the estate, but it is by virtue of the deed: so that the deed in his life time was no execution of the power reserved in the first deed, which was only to do it by a will.

But I must say this further to the case of the *Earl of Ormond*, that I do not take that opinion of the two Judges, *Hobart* and *Doderidge*, there delivered, to be law; and there were other two Judges, *Montague* and *Hutton*, that were of another opinion, and others were of their mind, and it did not come to a judicial resolution. And my opinion is this, that if a man made such a feoffment before or after the statute of uses, he hath the fee-simple of the use vested in him in the mean time, and therefore hath a power to dispose of it. And if he doth by deed in his life-time dispose of it, that is a good disposition, and the will shall not controul it,

for he is as much master of the whole estate, both before and since the statute of uses, as if he had made a feoffment in fee to the use of himself; and then an absolute disposition of this deed doth extinguish and destroy the power. If he, from whom the estate moved, doth reserve a power in any particular manner to limit any estate or estates by his will, the whole fee-simple is in him, and no act he doth do to dispose of the estate, will hinder him from executing of that power.

And as for this I shall quote you but one case, and that is in Lee 39, Broad's case: a fine is levied to the use of such persons, and for such estates as the cognizor should limit and appoint by his last will, and so the case comes home to this case; he after this covenants to stand seized of these lands to the use of his second son and his heirs, and then makes his will, and disposes of the estate therein according to the power. The question was, which of these dispositions should take place, the deed or the will? The will was according to the power, reserved upon the first fine, and the deed intervened before they come to execute this power; it was there held that having made a disposition of the estate by deed, though by a covenant to stand seized, that should take effect, and the will, though made according to the power, came too late to execute it. So that I think none of these cases that have been mentioned for this purpose are applicable to the case in question, nor argue or prove any thing material for that which the plaintiff's counsel intended them for.

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Ay, but say they, this will of 1675, and deed of 1681, make but one conveyance, and then the will that is the principal, that shall govern all the rest. Now this is a notion fetched from the courts of law, but very improperly applied in this case, as I think: for this will being revoked by this deed, is no conveyance at all; where several acts make but one conveyance, every one has its distinct operation to carry on the main design. As a lease and release, the lease conveys the possession for years, the release conveys the inheritance to the possession by way of enlargement. So a fine and recovery, and deed to declare the uses, make out one conveyance, but each performs its particular part: the fine conveys the freehold to one man, and upon the recovery it is conveyed to another, and upon the limitation of the use it is conveyed to a third; all are preparatory acts necessary to complete the conveyance of the inheritance whither it was at first designed.

Objection.

Answer.

Where several acts make but one conveyance, each has its distinct operation to carry on the main design.

But how will they make a will that hath no subsistence to be one conveyance with a deed, that before destroyed that will? I cannot see how, nor is it reconcilable with law or reason. So that for that matter, I think they have no ground to insist upon this point, that this being a deed relating to a will, may be revocable in equity as a will is at law. But to go on to the next.

This deed doth say, it was made and intended to confirm the will, and yet makes several recitals and limitations contrary to it.

Why suppose it were that it did recite the will truly, and said the will disposed of the estate so and so; and then adds that it was made to confirm the will, but yet disposeth of the estate quite otherwise than the will doth, shall this avoid the deed in equity,

The reciting part of a deed is no necessary part either in law or equity.

A deed repugnant in some part that is material to what is immaterial, no ground in equity to set it aside.

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Second consideration.

or make it to have another consideration than it else would have ? The reciting part of a deed is not at all a necessary part either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation. But when it comes to limit the estate, there the deed is to have its effect according to what limitations are therein set forth. And that is plain and full, without any manner of contradiction whatsoever.

Now because a deed is repugnant in some part, that is material, to what is immaterial, is that any ground in equity to set aside this deed ? Or make it more liable to a revocation than if they had been consistent ? That seems strange. Then here are mis-recitals and mistakes, which I take to be mistakes of the clerk ; and shall these mis-recitals of the will in the deed destroy the effect of the deed, when the meaning and intention of the parties is most manifest and clear how the estate shall go ? There is no reference in the limitations of the deed to the will, but only in the recitals, and there are mistakes. Now if the limitations of the will and deed are not applied to the mis-recitals in the deed, then those mis-recitals cannot hurt the limitations in the deed. If so be the limitations in the deed had been general to such as were before recited to have been limited in the will, then there had been some ground to infer that these mistakes should be a foundation for equity to rectify those mistakes. For that supposes the recitals in the deed containing the dispositions of the estate by the will are right, and would come too late at the time of the limitations to recite them, and that were a mistake, that may be a good ground in equity to relieve against the mistake.

But when it comes only by way of recital to be disposed by the will one way, and then doth in express words limit it a contrary way, the intention is plain that it should go according to the limitations in the deed : and there can be no foundations in equity to set it aside. The rule of law is, *benignæ sunt interpretationes chartarum*. And I suppose there ought to be a great deal more indulgent interpretation of them in equity, to maintain the intention of parties. So that as to that first point concerning the frame and manner of this deed, and the contradictions to and mis-recitals of the will in it, there is no foundation of equity to relieve the plaintiff against the deed, unless the power of revocation in the deed were legally pursued.

The next thing is, whether there be any thing proved in the manner of obtaining it from the Duke, or mortgaging or continuing of it after it was obtained, be any foundation for equity to relieve against it ? And for my part I see none.

First, I do not see any manner of evidence to prove any indirect practice for the obtaining of this deed from Duke Christopher. The most that can be made of it is but bare suspicion, and indeed that a very slender one too.

But, say they, can you prove the Duke ever read it, or had it read to him ? That is a strong objection, when it is proved to be before witnesses, and so many ; sure that is but a slender ground of equity the not reading of it. But nothing of surprise, or igno-

rance in the Duke of what he did in it, ought to be supposed, because Sir William Jones, who is proved to be the Duke's counsel, was by, and a witness to it. I told you at first Sir William Jones's hand to be to the draft and deed must be admitted, because I take it for granted that this at law is a good deed. And if I did not take it for granted that that was Sir William Jones's hand, and he was a witness to the deed, I should not take it for a good deed. But I meddle not with the point of fact, but take the fact to be granted to bring the judicial point in question, so that it is his hand, and he is a witness to this deed.

Then secondly, it must be imagined that when Duke Christopher made this deed, he did it with some design or for some purpose or other, and if so, you cannot imagine that the Duke was at all surprised therein, but that when it was executed it was according to that design and purpose.

Next Sir Thomas Stringer, who was the Duke's counsel to peruse and amend the draft, as appears by his own hand, sworn by his son, and his man; to imagine then that a man should be surprised unto the making of a deed when his own constant counsel doth peruse and amend the draft, and the counsel be used particularly to advise with, is by at the execution, and a witness to it; is to say, a man was surprised when he had the advice of counsel about it, and they were at his elbow at the executing of it.

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Now I must confess I am to seek, and not well know what is a fraud in equity, that will avoid a deed, which is a good deed at law. The case of Bodvile, and Wynne, and Roberts mentioned by my Lord Chief Justice, and my brother Powel, that spake the last day this cause came on, is I think a case of great authority in a court of equity, because it had a great transaction both in this court and in the house of Lords, before it came to a resolution or result. I shall put the case in short as it was here in court.

Bodvile, Wynne, and Roberts' case, V. Rep. in chan, 1 part, 226.

Mr. Roberts, son to the late Earl of Radnor, married the daughter of Mr. Bodvile. Bodvile had made a will, and given his lands to the children of his daughter in tail, and after this he makes another will whereby he gave one part of the estate to Mr. Wynne, and another part to a remote kinsman. It did most plainly appear in the depositions of this case, that this will was obtained by great fraud and circumvention; that is, Wynne got into his acquaintance by pretences of some little offices of friendship and kindness, he got him away from his friends and relations, and during his sickness he did by false stories draw his affections from his daughter, kept him in secret places, that no friend might come at him, and while he was so secreted and wrought upon, was this last will made, whereby he gave his estate away from his child to a stranger. All these pieces of practice were apparent before the court at the hearing of this cause, which was heard by my Lord Clarendon, assisted by who all unanimously declared, that this was a will obtained by fraud and by practice, and that there was great reason if they could, to relieve against it. But they searched precedents, but could find none that would come up to the case. Thereupon for

difficulty, there was advice taken about it in the house of Lords ; and there, upon consideration, was an order made, by way of advice to the Lord Chancellor, that he would proceed to do justice to either party, though there were no precedent found to govern the judgment. Afterwards this cause came to be heard again 12 June 1666, when my Lord Chancellor being assisted by my Lord Chief Justice Bridgman, my Lord Chief Baron Hales, and Mr. Justice Raynsford did declare, that there could be no relief, though, as it was said before, it was apparently a will obtained by fraud, and this to the prejudice of the heir at law, who had never offended, or given him any cause to disinherit her. So the bill was dismissed, but the parties complaining in parliament, were relieved by the legislative power by an act of parliament.

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Now, besides that there was evidence of ill practice in that case, but in this I say, I find none ; this is so great an authority, and does show the wariness of a court of equity, that I think none can be greater: equity would not relieve them, but they were put to seek their relief by a law made on purpose.

But I will suppose now in this case, that when my Lord of Bath did understand the kindness of Duke Christopher, and knew of the will of '75, and knowing the inconstancy of the Duke's temper, and other circumstances in the family, and the revocableness of a will, should have applied himself to the Duke, and told him, it is true, you have been so kind as by your will to bequeath me a great part of your estate, but you may be prevailed with on a sudden or by some artifice or other, to alter this will of yours ; and you may be surprised into the doing of it ; pray will you make a more solemn settlement to confirm this kindness by a deed ; and had prevailed to get him to do it. Suppose, I say, he had done so, though I find no evidence in this case of any such thing ; suppose he had been employed in the whole transaction of such a deed, is this unlawful ? Or is it any harm ? No, it is very innocent, he might lawfully do it ; and if he had opportunity he might prudently do it. But I say, I find not so much as that in this case, but this deed was fairly obtained from the Duke ; whether it was by the advice, desire, or interposition of my Lord of Bath, doth not appear, or whether it were the Duke's own voluntary act, though I think it is not material, whether it was the one or the other.

Objection.

But it hath been said, that when Duke Christopher did design to alter his will, and for that purpose sent for my Lord of Bath, to bring the will of '75, which he had in his custody, my Lord of Bath should have told him of this deed too : and therefore the concealing of the deed of '81 from Duke Christopher is a kind of fraud ; and not making a discovery of it then, he shall not now take advantage of this slip, and have the estate by this deed ; because if the Duke had considered the proviso in the deed, he would have taken effectual care to have had a good revocation in all the circumstances ; and that he did not so revoke it, must be imputed to the concealment of this deed from the Duke, by the Earl of Bath.

So was the case of Mr. Clare, at the suit of the Earl of Bedford.

which was opened the last term. A man that stands by and sees a cheat which might have been prevented by his discovery, shall not take advantage of his own wrong and profit by such concealment. But doth it appear in this case, that my Lord of Bath knew to what purpose the Duke sent for his will; or how or in what manner he would alter the settlement of his estate? Why must he be bound to take more notice of this deed to the Duke, than the Duke himself? It was the Duke's own act and not my Lord of Bath's, and why should he give him notice of his own act?

Answer.

The rule of law, when one is obliged to give notice to another, is this: when the thing lieth more in the knowledge of the one than the other, and he cannot come to the knowledge but by his means: but when one man hath reason to know, and doth as much as the other, he is not bound to give notice to that other.

Besides, it doth not appear, as I remember, (for it is some time since this cause was heard,) that my Lord of Bath did know to what purpose the duke did call for his will; and the deed and will were possibly both in the custody of the Duke; for though at the time of the execution of the deed it was delivered to my Lord of Bath, yet that was only for the due execution as a deed; for my Lord in his answer saith, he knoweth not where it was afterwards, till delivered to him by the Duke with the will, under one cover, some short time before he went abroad. And so there is great reason to induce the belief that it was in the Duke's custody.

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Then as to the objection of secrecy, it is kept secret all along, and no body can give any account of this deed. Take it for granted it was so; shall a settlement in a family (where the nature of the thing requires secrecy) because it is kept secret, be set aside for secrecy? it ought to be kept secret, and that is no objection at all; persons do not usually intend that all the world should know how their estates are settled.

But say you, at least here is a general presumption, take all together, upon the circumstances of the whole case, that there was some kind of management in concealing this deed. Now, in a Court of Equity shall presumption be sufficient to found a decree upon? If that shall avail in a Court of Equity, it is an easy matter, according to the judge's faith, to presume a man out of his estate. There are presumptions of several sorts, some are violent, and some probable: a violent presumption, that such a man hath done such a fact, must be when a fact is done; and no other can be thought of to have done it: as if a man be killed in a room, and another man comes out of the room with a sword bloody in his hand, and no body else was in the room. Here is a plain fact done, and though no body can swear they saw this man do the fact, that he killed him, yet from this evidence there is a very strong proof.

Presumptions of two sorts, violent and probable.

Of what force

But a probable presumption alone is no proof to rely upon; where indeed there is some proof of witnesses positive, and the presumption is probable that is added thereto, it may be a good fortifying evidence, but it signifies very little of itself for a foundation.

So that I think here is no proof or evidence, that my Lord of Bath did surprise the Duke; or that the Duke was surprised in this matter; or that there was any indirect means used to conceal it from the Duke. And so I have done with the second head that I at first proposed. Therefore,

Third consi-
deration.

Thirdly, I come to consider the persons that are concerned in this cause, that is, those that claim by the deed of '81, and those that claim by the will of '87. Those that claim by the deed of '81, are relations of Duke Christopher without all question: My Lord of Bath that is entitled to the greatest part of this estate, is a very near relation, and a person that had done many kindnesses for the family, had been constantly assisting to the Duke in his business; and the others are near relations too.

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Then for those that claim by the will of '87, Mr. Monk, that claims the main of the estate, is in the will called cousin; but it is plain (if at all) he is not so nearly related: so that when in respect of the persons that claim by contrary voluntary settlements, there is an even equality of relation, and no difference of consideration (much more when there is an inequality) he that hath the best title at law must carry the estate? For what is it that makes the difference, but the difference of the consideration? As in the case of a deed in consideration of blood, and an after-deed to a purchaser for a valuable consideration; the last shall take place, as the best consideration.

But for revoking a voluntary settlement, in favour of a subsequent one, where there is no difference between the parties as to the consideration, I think hath no ground in reason. There is as much equity for the one as the other. It is perfectly at large, and I take it to be a constant rule, that where one party hath no more equity than the other, the law must take place, and that in this case being manifestly for my Lord of Bath, by this verdict, equity ought not to take it from him.

Cases in chan.
1 part, 263,
264.

This principally was the foundation of the decree in that case of Smith and Ashton, that has been likewise mentioned and urged before: there was a power under hand and Seal to be attested by three witnesses, and to charge the estate with portions for younger children; so it is a limited power: then he makes a revocation for advantage of younger children, but not exactly pursuant to the circumstances of the power. This was held good in equity, and all the reason in the world it should, because a man is obliged to provide for his younger children; and it is against all justice and reason to make such a settlement upon the eldest son, as to send all the other children a begging, being under the same natural obligation to provide for the one as the other. Therefore, because of that natural obligation, equity hath been indulgent to support such provisions, because the first settlement that disabled him for it, was wrongful and injurious, and contrary to all equity, and then in such case equity is very indulgent.

But I would put this case: a man settles all his estate upon his younger son for life, with a power to revoke by a deed, sealed in the presence of three witnesses; without more ado he makes his will, and disposeth of his estate to his eldest son wholly, and that

will is attested (as put it before the statute) by two witnesses : Is this a good revocation in equity ? I say, no ; for the one is as nearly related to the father as the other, the considerations are equal, the one is as much a son as the other, and therefore there is no great difference between them ; and the younger son who hath the estate by law, shall enjoy it, though afterwards it return back to him that was the eldest.

The fourth and last point is this, whether in respect to Duke Christopher, and those circumstances that attended him, there be any reason to relieve against this deed in equity. And here.

Fourth and last consideration

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First it is said, if a man make a feoffment with a power of revocation under such circumstances, and doth make a revocation, where all the circumstances are not observed, is he such an owner still of the estate as that equity shall support the disposition ?

I say, no ; for that is to set up equity in direct opposition to the law : for when a man hath restrained himself by a particular power, and hath no legal right to dispose of this estate, but by exactly pursuing that power, equity cannot enlarge that right or power.

Legally you agree he cannot ; for if he could, then were there no reason for imploring the aid of a court of equity : and there is the greatest reason he should be obliged by the rule of law in a court of equity, because it is a law that he hath put upon himself : and that is the equity of the legal obligation, because it is supposed to be made by his own express or implied consent, by his representative to all laws. Here is a man that hath made a deed, whereby he has actually restrained himself from disposing of his estate ; but in such or such a way. By the same reason, that you in a court of equity will construe it a good execution of the power, where the circumstances are not strictly observed, you may allow a man to revoke a voluntary settlement, when there is no power reserved to him in the deed so to do : and that I take it no one will be so hardy as to affirm.

A man voluntarily makes a settlement to the use of himself for life, and after to other uses, and reserves no power of revocation at all, he cannot revoke this ; no, not in equity : and the reason is the same as to the power reserved, where it is not pursued ; for he has no other right to do it but by the power, and it is as if he did it without a power, unless he make a due use of such a power as he had.

Where a power is reserved and not duly pursued, it is the same as if he did it without a power.

It will be manifestly inconvenient, if a court of equity have such a latitude in power of revocation : for it is not sufficient to say it is unreasonable a man should be restrained, when a man will restrain himself ; nor do I see what reason there is to say it is imprudent. Indeed, to argue thus, is to make a man less proprietary of his estate, than the law hath made him, that he shall not settle his estate in such a manner as he pleaseth to order for himself ; a man at this rate is never master of his estate ; he makes the first settlement as owner, and it is no matter whether he hath a reason for making it or no, *stet pro ratione voluntas* ; but then when he hath so done, both law and reason bind him to observe it, and there is no reason for a court of equity to avoid it.

Be a man wise or unwise, if legally *compos mentis* he is the disposer of his own property.

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I must confess, courts of equity would have enough to do, if they were to examine into the wisdom and prudence of men, in disposing of their estates, and if they were not discreetly, but foolishly done ; therefore to set them aside, there would need more courts of chancery than there are, to despatch the business of equity in this point : but be a man wise or unwise, if he be legally *compos mentis*, he is the disposer of his own property ; and though he do not dispose of it so discreetly, as a judge or a great lawyer would do, there is no reason equity should interpose to alier it.

Besides, there may be a very good reason for a man to put such a restraint upon himself, and for a wise man to do it too ; for a man may know the frailty of his own temper, how apt he may be to be surprised and prevailed upon to make a precipitate or inconvenient will, settlement, or disposition of his estate. Now to restrain this infirmity which I have, and to prevent an inconvenience that may arise by my disposing of my estate upon a surprise, I will restrain myself, and settle my estate so and so, that if there be a deliberate intention in me to alter it, I may solemnly execute such intention ; I will therefore have so many witnesses, and those of good quality, that, if they find me about any such action, may advise me in it, and prevent any apparent surprise into the doing of any action that may be foolish, rash, or prejudicial : for that reason I will bring myself under such and such restraints.

And when we see a thing done that may have a good reason given for it, as there may be for this circumscribed power, to restrain from rash, sudden actions, it is to be presumed that it was done upon good reason ; and therefore the pretended unreasonableness of setting the owner of an estate by himself, mentioned at the bar, is no argument against it : for it may be rather (and that is rather to be presumed) upon very good reason than upon no reason at all.

Now I think it was never yet determined, or settled in a court of equity, that a revocation that did not pursue the power was good in equity : it has been settled and decreed not to be good, and that is the case of Arundel and Philpot, which came first into the King's Bench, and then into Chancery, and afterwards into the King's Bench again, and there it had its period. A woman makes a voluntary settlement upon a friend, with a power to revoke upon the tender of a guinea ; and upon some falling out or quarrel that happened between them, she makes another settlement upon Arundel : at first in the King's bench they could not prove the tender of a guinea, and so the revocation was not good at law ; therefore they come into a court of equity to be relieved. It was held that no relief should be had in the case, although there was a proof of provocation given, a quarrelling and falling out, and so there might be some reason to revoke, but no reason to revoke otherwise than according to power : so the will was dismissed. Afterwards upon a trial at law, that matter was substantially proved, that in the heat of the provocation the guinea was tendered, and consequently a good revocation ; and that I

Arundel and
Philpot's case.

look upon as a full authority that there can be no revocation in equity where it is not a good revocation at law, unless there be a particular intention in the party to revoke, which he could not effect pursuant to the power, by fraud or accident.

No revocation in equity that is not good at law, unless the intention hindered by fraud or accident.

The case of Thorn and Newman I take to be good at law, and therefore to be sure good in equity; there was to be a tender of 12d. at a day, in the Middle-Temple-hall, the 12d. was tendered at the day, but not the place, and accepted. That was before my Lord Chief Justice Hale, and the party nonsuited upon it. For upon a condition to pay money at such a day and place, the money he tendered to the persons at the day, though not at the place, that tender to the person is good, being a case of money, but it is not so in a collateral condition for doing of any other thing. And though it had not been in that case good at law, it might be held to be good in equity upon another account; because, there were children in the case, and it was to make provision for them.

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Now I do acknowledge that a power of revocation not well executed at law, may be in equity in some other cases: as where a man having such a power has a real intention to revoke, and his intention is known, but he is prevented by a particular accident, and surprised when his design was so to do, but he could not perform that design, as by reason of sickness, or that it was to be done in a place where he could not go. If any accident obstruct that intention, it shall be looked upon as good, and shall prevail.

But now in this case of the Duke of Albemarle, it doth not appear that he had any such intention of executing his power. It is true, he made his will, which is quite a contrary disposition of his estate. That is an evidence of his intention to make a new will, but not to revoke this deed; he was no way hindered by any accident or irremovable impediment from executing the power according to the circumstances. He was in the place where best of all throughout England he might have had three peers to be witnesses of it. The will was executed in London, at Sir Robert Clayton's house, and there were then two peers in the house; therefore, since he had an opportunity to do it well, and would not do it, this can never be construed a good revocation in a court of equity. And I think truly that any such construction would induce many absurdities. For,

Absurdities that might follow.

First, It is to set up a power in a court of equity in direct opposition to the courts of law, and so let a man loose in equity for no other reason, but because he hath restrained himself at law, by a law of his own making.

Secondly; it is as much as to say, that because a man may dispose of his estate one way by law, therefore in a court of equity he shall dispose of his estate any way. That is a very strange but a true consequence of this doctrine, because a man settles his estate such a way, without such a power to alter it in such circumstances, therefore he shall do it any way. At this rate tenant in tail may dispose of his estate without a fine in equity, because he might have done it at law with a fine; for the same equity there is in both cases. So a copyholder of inheritance may in equity dispose of his estate without a surrender, because he might do it at law by a surrender.

1.

2.

3. Thirdly, it were to enable a man to give away more than he hath in him, for he has no more in him than according to the power reserved to himself. And,

4. Fourthly, it is to frustrate the intent and design of all settlements whatsoever; so that I think there is no reason at all for this court to let a man loose, that has thus restrained himself, unless there be some special reason in the particular case, for the sake of which a man ought to have his case vary from the ordinary rules.

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Then let us consider next the circumstances that the Duke was under at the time of making this will; you that are for the plaintiff say that he had forgotten this deed, and therefore it being an old and forgotten deed, it shall not have any regard in a court of equity, it not being taken any notice of by the party himself.

Objections answered.

First, I pray consider whether the evidence does not prove the quite contrary: it was a settlement made very solemnly; it is very well attested by six witnesses, persons of consideration; it was done with deliberation, and done but in '81, the will is in '87; it is not to be presumed that the Duke did or could forget a settlement so solemnly and deliberately executed. I say it is hard to presume it, but rather the contrary, that he did not forget it.

Besides, though he had forgot it, Sir Thomas Stringer who was an instrument about this will had not forgot it, for he made an abstract of it about that time with the very date in it. And I take it the memory of the counsel in such a case, is the memory of the client. Suppose a man make a purchase and he carrieth the deeds of the title to counsel, and he espieth a trust in the deed, and acquaints his client, and yet he will purchase, shall equity relieve? it may be the counsel overseeth this trust, and the purchaser is called to account about it; says he, I had no notice, I knew nothign of any such trust; I am a purchaser for a valuable consideration, and it ought not to affect me. But then they come and prove that the deeds of the title were carried to counsel, they saw this trust, or had an opportunity to see it. Then I take it, notice to the counsel is notice to the client, and the man that paid the money must lose the estate: so here Sir Thomas Stringer's memory is the Duke's memory.

But pray how comes it to pass that forgetting of a deed is a ground to revoke in equity? Must the goodness and validity of a deed depend upon the memory of him that made it? Memory is slippery, but a deed is permanent, and made to abide for ever. Because men are apt to forget what they have done, therefore shall their deeds have no more effect in a court of equity than if they had never been done at all? this I confess is very new and strange doctrine to me; when a thing once comes to be put into writing, we say it is never forgotten *littera scripta manet*.

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But then truly they say it is inconsistent with the honour of the Duke of Albemarle, that he should make this stir and do about this will, and pretend such kindness to Mr. Monk, and desire a title of honour for him, and yet not intend to revoke this settlement that stood in the way. The others they say, how is it consistent with the Duke's honour to intend to revoke it when there

was such a friendship between the Duke and the Earl, so many services and obligations performed by the Earl, such a trust and confidence reposed in him even to the last, as it is plain there was? how comes this to pass? But so it is; they are acts very much inconsistent I confess. But for persons honours in judging of causes we have nothing at all to do with them.

For my part I see no reason in the world that the Duke had to alter his mind as to my Lord of Bath, there is no appearance of any unkindness or displeasure conceived by the Duke against the Earl, but an entire trust and confidence to the very last, as is evident by the order of the keys of the evidence-room to be delivered to him when he went away, and to consult with him upon all occasions.

But withal, I do not know what the meaning of it should be, if he really intended any effect as the will of '87, which without all question is well proved; and were it not for this deed, would be a good disposition of the estate. Yet though it doth contradict the deed of '81, I cannot but take that to be a very good deed, and not to be set aside by this will.

I have nothing further to consider in this case, nor are we to make presumptions, and then to make inferences from thence. We are to judge upon the fact as it appears in the depositions which are plain and clear, and upon these we are to determine our opinions, and nothing else that is dark, and that we cannot come at further than conjecture. There have been other things said in the cause, which I omit on purpose, because I would mention only those that are most material. Upon the whole matter, I am of opinion there ought to be no relief in this case against my Lord of Bath and those that claim by the deed of '81.

Conclusion.

Lord KEEPER.

I shall first take notice how these causes stand in court, and who are the parties in judgment before the court.

Here are three bills; one in which the Dutchess of Albemarle was plaintiff, and since the intermarriage my Lord of Mountague is also plaintiff against my Lord of Bath and others defendants, and this bill sets out the late Duke of Albemarle's marriage settlement, and his will of '87, with the solemnity both of preparing and executing it, and doth complain that the Earl of Bath sets up another will, and a deed in '75, and '81, whereby he seeks to frustrate the disposition of the Duke's estate by the will of '87. And the bill doth allege that if any such deed was ever executed by the Duke (which they have reason to doubt and do not admit) they believe the same was imposed upon the Duke by surprise, and not fairly obtained, and by fraud were concealed from the Duke, and ought to be set aside in equity, though the power of revocation in the said deed were not strictly pursued, because his intention appears to revoke it, and dispose of the estate otherwise by making

The case, as it lies in three several bills.

the will in '87: and if it should not be set aside, then the Dutchess ought to have the lands limited to her by that deed, and the rent charge of 2000*l.* a year, over and besides the jointure settled upon the marriage, and confirmed by the will of '75. And the will of '87 ought to stand good as to the personal estate and legacies therein; and so prayeth to be protected in the enjoyment of the personal estate, and specifieth legacies given to the Dutchess' discharged of the Duke's debts.

There is another bill brought by Christopher and Henry Monk, which complains of my Lord of Bath, and the others setting up this will of '75, and deed of '81; and I think in the same words, or to be sure, to the same effect with the other bill, and prays that both will and deed may be set aside, and the plaintiffs may enjoy the benefit and estate given them by the will of '87.

Then there is a third bill of my Lord of Bath, Mr. Grenville and Sir Walter Clarges, in which they set out the will of '75, and the deed of '81, and the continuance and constancy of the Duke's friendship and trust to the time of his death, and complains that the Dutchess and other defendants set up the will in '87, and do pretend that amounts in equity to a revocation of the deed of '81; and this bill prayeth that the personal estate may be applied to pay the Duke's debts in discharge of the real estate, which they pray may be confirmed to the plaintiffs in that suit, and a discovery of the writings about the real estate: and that they may be brought into court, and delivered up to the use of the plaintiffs.

These causes were first heard before the Lords Commissioners, so long ago as the 8th of July 1691, then was there a decree made that the personal estate should be accounted for, and applied for the payment of the debts; but before the court would deliver any final judgment as to the real estate, they ordered a trial at law to be had in an ejectment, wherein the Dutchess and Mr. Christopher Monk were the lessors of the plaintiffs, and the Earl of Bath, Mr. Grenville, and Sir Walter Clarges, to be defendants to try the title to the real estate, and the plaintiffs were only to insist upon the will of '87, and the deed of '81, so that as the defendant's right upon the said will and deed might be fairly tried. And all exhibits were to be left with the master three weeks before the trial, for either side to inspect, take abstracts and copies, as they should think fit.

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According to this order. in the Michaelmas term after, there was a trial at the King's Bench bar, and upon that trial a verdict passed for the defendants in the ejectment, the Earl of Bath, &c. upon the will of '75, and deed of '81. After the trial, these causes came to be heard again before the Lords Commissioners, about a year and a half since: at that time there was no complaint made of the verdict, nor any motion for a new trial. But after the counsel had been heard several days, the court took time to consider of their judgment; and before judgment, one of these causes abated by the marriage of my Lord of Mountague and the Dutchess; and by that and other accidents, the cause hath been delayed till the late hearing before the court, assisted by my lords the judges, who have delivered their opinions. And now the causes stand for the opinion of the court, upon what appears in

the pleadings and proofs, and what has been so largely insisted upon on either side.

Upon which, the verdict being at law for the defendants, I must take it as my lords the judges have already declared, that only that these deeds of lease and release, of the 15th and 16th of July, '81, were duly sealed and executed by the late Duke of Albemarle, but also that they stand still in force, and unrevoked at law ; for if they had not been so, the verdict could not have been, as it was, for the defendants.

Therefore, as that must be taken for granted, that these are good deeds in law, the only matter at present for the consideration of the court, is, whether upon the debate of this cause there be sufficient ground in equity for this court to interpose in the case, so as to set aside these deeds as not good in equity, or revoked by the will of '87, or no : and I shall, as to the matter of the question, conclude my opinion the same way with my lords the judges that have delivered their's before.

The only matter in question.

And with respect to this matter, I shall here consider who the parties are in judgment before the court, and what hath been alleged as reasons and grounds to induce the court to set aside this deed in equity.

Here is no purchaser in the case, no creditor, no child unprovided for, but all the parties claim by voluntary conveyances on the one side and the other ; so that at least they stand equal ; or if there be any circumstances as to the persons that have any weight, it is on the part of my Lord of Bath.

There have been several things insisted upon by the counsel for the Dutchess and Mr. Monk, as grounds whereon they would find that equity which should impeach this deed of '81 : I would mention them as I apprehend they were offered, and I will, as far as I can, avoid being tedious, or use unnecessary repetitions of what has been already said.

Grounds offered for impeaching the deed of '81.

First, it has been offered, that this deed was obtained by fraud and surprise.

1.

Secondly, if it were originally fairly obtained, yet it was unduly secreted and concealed from the Duke, that he could not come to know the true contents of his power ; or if it were not concealed, yet it was utterly forgotten by the Duke, which was the reason and occasion why sufficient care was not taken to execute the power as it should have been.

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2.

Next, that though the power of revocation was not literally executed, yet his intention appearing clearly to dispose of the estate otherwise, it ought to be supported in equity.

3.

Then that deed of '81, was but ancillary (that was the phrase) to the will of '75, which being agreed to be revoked by the will of '87, the deed must fall with it.

Another thing was, that what the Duke had done amounted to a revocation.

Then that there was a general trust, and the Duke remained owner of the estate, and might charge it as high as he pleased to the utmost value, and so being absolute master of the estate, his subsequent disposition of it by his last will ought to be made good in equity.

There are many things accumulated together, and so make the better show ; but it is best to consider them severally, if we would know the true weight of them.

To the first head.

It is true, it is charged in the bill that this deed was obtained by fraud and surpriso, and that it was concealed from the Duke, or forgotten by him, and he had an intention to revoke, and went as far as he could ; so that they are sufficiently let into this matter by what is charged in the bill. But whosoever reads over the depositions, will see that the end they aimed at, was, to attack the deeds themselves as false deeds, and not truly executed ; but that being tried at law, and the will and deeds verified by a verdict, the counsel have attempted to make use of the same evidence, and read it all, or at least the greatest part of it, as evidence of surpriso and circumvention.

Fraud and circumvention things not to be presumed.

But I think that ought to be well considered by the court, for we are not to found our judgment upon that evidence, which, if it be to be regarded at all, did amount to no more than what was insisted upon, and which is positively contradicted by the verdict. As to fraud and circumvention, it must be granted me, that they are things not to be presumed ; it is all denied in the answer, and the proof must be very clear, if it be to be regarded by the court.

Surprise what

Now, for this word (surprise) it is a word of a general signification, so general and so uncertain, that it is impossible to fix it ; a man is surprised in every rash and indiscreet action, or whatsoever is not done with so much judgment and consideration as it ought to be : but I suppose the gentlemen who use that word in this case, mean such surprise as it attended and accompanied with fraud and circumvention ; such a surprise indeed may be a good ground to set aside a deed so obtained, in equity, and hath been so in all times ; but any other surprise never was, and I hope never will be, because it will introduce such a wild uncertainty in the decrees and judgments of the court, as will be of greater consequence than the relief in any case will answer for.

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They say this surprise was made out two ways, by matters that appear in the deeds themselves, and by circumstances in proof that arise out of the deeds.

As to the matters that appear in the deeds themselves, they urge,

Objections to the deed itself.

First, that it is expressed in the deed of release that it is made in corroboration of the will, which is inserted throughout.

Then that it is imported to be for the confirmation of the will, when in effect it doth fully revoke it, because there are no limitations in the deed, but such as vary from those in the will.

Then that it is for securing the legacies in the will, and yet itself defeats the will.

That as to a great part of the estate, the deed limits it to my Lord of Bath after failure of issue male, excluding the daughters, whereas in the will that limitation is after failure of issue generally.

That the provision in the deed for the third son is ineffectual, because the Duke had not power to settle it so.

That the power of revocation is unreasonably fettered, and the

covenant whereby the Duke, who was then very young, is obliged not to revoke the will, is a derogatory and illegal covenant.

And the unskilful phrase and language of the whole conveyance must be a demonstration that Sir William Jones was not employed in it, as is pretended; these are the objections to the deed itself.

Now as to the misrecitals, as my Lord Chief Justice has said, *Answers.* they will have no influence upon the limitations, because the recitals in a deed are not made the measure of the limitations in it: besides, as I apprehend, here are none of these misrecitals which are of that nature, as to draw on the Duke into a mistake in the favour of my Lord of Bath, for the recital that the Dutchess had a much greater estate by the will than she had before, as the limitation of Dalby and Broughton for life, when it was but during widowhood, this might lead the Duke indeed into mistake in favour of the Dutchess, as it did, and might have induced greater limitations of the same kind, but never to the advantage of my Lord of Bath, who was to come in remainder; so that all the inference that can be made from those misrecitals, is only that Sir Thomas Stringer, who (it is apparent in proof) drew the deed, was a careless man.

Then they say the variation of the limitations from those in the will, sheweth that it was to revoke the will, and not to confirm it; as to that,

First, such variation is a proof that the Duke, between the time of the will, and the time of the deed, had altered his mind as to those particulars; but to carry it further, I see no reason in the world.

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Next it hath been observed, that the words of the deed which purport the end of it to be for the confirming of the will, must plainly in reason infer to the principal designs of the settlement, which was to dispose of his estate to my Lord of Bath, and the nearest of his relations, and not to refer to any particular limitation in the will; and that it doth so confirm the will, as to the main principal limitation of the will, is plain; and it doth appear by the very phrasing of the deed, that besides the confirming of the will, he did mainly design the settling of his estate.

Then let us consider the differences in point of limitation between the deed and the will.

First, they say in the deed, there is an estate limited to the Duke for life; which is not in the will, that is proper in a deed, but would have been absurd in a will which is not to take effect till after his death.

Then for that variation in the limitation to the Dutchess, it is not material in point of value, but for duration to the Earl; and it was a reasonable thing so to make it; for since he did intend to charge his real estate with great legacies, it had been impossible to have sold any part of it that had been under a rent-charge of 6,000*l.* and therefore it limits lands of that value.

As for the limitation of Norton-Disney, which indeed is to the advantage of my Lord of Bath, and is the only variation from the will which is so; for with respect to the Essex and northern

estates, my Lord has but a remainder after failure of issue in general, but in this it is after failure of issue male. But then it is to be considered, that the honour would fail upon the Duke's death without issue male, and he did intend and desire that the honour of Duke of Albemarle should come to my Lord of Bath: his father had gone so far in it, as to procure a promise of it under the sign-manual by King Charles the Second, and at the same time he had an estate of 15,000*l.* a year; and then it became him well that such a part of the estate should go with the honour.

As to that objection, that thereby there was no provision made for daughters, it were indeed a very great one, if indeed there were no provision at all for them; but it means no more than that if he left no sons, there would be an ample provision out of the rest of his estate for daughters; and so in effect it is upon the marriage-settlement and the will of '87; so that if it be an argument of surprise as to the one, it is the same as to the other.

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Then for that provision that is made out of Rotherith and Norton-Disney, for the third son, it must be admitted, that as to my Lord Duke's mind in the matter, it would be ineffectual; but there can be nothing inferred from thence, but that there was a great neglect of looking into the settlement: but that will be no ground in equity to relieve against this deed; for if it should be so, how many settlements must we set aside upon men's settling that over which in part they had no power of making such disposition, because the persons concerned in drawing the settlement, did not take sufficient care in every particular, to pursue the power he had who makes the deed?

Besides, there is the same mistake in the will of '87, in relation to Potheridge, where the barony for Mr. Monk was to be fixed, it being by a settlement in King Charles the First's time, so settled in tail, that it could not, or was not legally to be disposed of by will.

Indeed, it was said, that there were some articles made with Pride about that matter to carry the estate according as the Duke should direct; but those articles cannot answer the objection, for they were made three months after the will, and then they were made with a wrong person, and so signify nothing.

It has been objected, that this deed pretends to be for securing legacies in the will of '75, but defeats them: that is a mistake in the objection; for it confirms the will certainly as to the legacies, and doth create a trust for performing and paying them: indeed by a subsequent act, (*viz.*) the will of '87, there may be an alteration made; but that is no argument against this settlement itself.

There was another objection made, and that was, that the power of revocation was unreasonable, especially backed with such an unreasonable covenant not to revoke: but as to that, it is to be considered what the design of this settlement was; he had made his will before, but he thought himself unsafe under that disposition; he was under apprehension of being applied unto, and importuned to dispose of his estate otherwise than he had a mind it should go, therefore he intended this settlement as a

guard against any surprise of that kind ; and that being his intention, if it had been only a general power of revocation, it had been no more than what any will or subsequent act done by him would have effected, but that had not answered his meaning.

And so as to the last covenant in the deed, which they call the derogatory clause, whereby the Duke covenants not to revoke the will otherwise than as aforesaid, I take it, that doth import no more but that as to the preceding part of the deed, he guards himself against surprise as to the real estate, so he doth here as to the personal estate. And though it prove ineffectual at law, that is not material as to the intention of the Duke.

The last objection upon the deed, is, the penning it, which is an objection that is to go through the whole deed ; but this objection goes further than the point for which it is alleged ; for if it prove any thing, it proves it to be a false deed : but for this, I do not find it so much as suggested that this deed was drawn by Sir William Jones ; my Lord of Bath indeed says, that it was left to the care and conduct of Sir William Jones ; but as to what appears, he was only concerned in the proviso : for it is very good reason to believe, when he says [I approve of this proviso] he did not refer his opinion to any other part of the deed : and indeed any one who knew or remembered him, will think that he concerned himself with no other part but what he set his hand to the approbation of.

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I have taken notice of those objections and arguments urged by the counsel, which, taken altogether, should induce their ground of equity from a surprise in obtaining this deed ; but when they are severally considered, they seem not to be of such weight as is contended for.

But if the objections had been more in number, or of greater consequence, yet let the deed be never so ill drawn, and the mistakes and misrecitals never so many, and the differences of limitations in the deed from those in the will never so many too : yet if this deed were really executed by the party, all this will not be a sufficient ground in equity to set aside this deed. And the counsel for the plaintiffs were very well aware of this, and therefore they go to other circumstances out of the deed, to show this surprise ; and, as far as I can observe, the objections upon this point are these :

That there is no proof of any previous direction for drawing of this deed, there is no proof of the draft or deeds being read to the Duke, no counterpart was executed; the trustees were not acquainted with it ; there was an estate limited to Sir Thomas Clarges, when there were great differences between the Duke and him ; it is not subscribed by the Duke's counsel, as all deeds executed by him used to be ; that it was not ingrossed according to the draft, and that in a very material place ; for if it had been according to the draft, the Duke had been master of the estate by a general trust ; and if it were not perused by Sir William Jones, or he was not a witness to it, then so far as Sir William Jones was surprised in the matter, the Duke was so too.

Other objections from circumstances out of the deed.

Now as to the want of proof of any previous directions for this

Answers.

deed, that is not strange after such a length of time; Sir Thomas Stringer, who drew it, is dead; four of the witnesses to the execution of it are dead too: but the presumption is very strong, when the draft is of Sir Thomas Stringer's son's hand-writing, and corrected and interlined by his own hand in several places, that he had orders and directions from the Duke to prepare such a deed.

The reading or not reading the deed to the Duke, doth not appear; it might be read to him before, and it was not necessary it should be read to him at the time of executing; if it were, then the will of '87 lies open to the same objection, for that was not read to the Duke when he sealed it.

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As to that objection, that there was no counterpart, nor the trustees acquainted with it, that can be nothing of an objection; for the deed remained in the Duke's hands till a little time before his going to Jamaica, as appears by my Lord of Bath's answer, which hath not been falsified as I know of in any point; nor was there any occasion to give notice to the trustees, because there was no manner of estate, or trust lodged in them. But my Lord of Bath was the only person that had any trust in him by the deed, therefore there was no reason that it should be known to any one but him; and the nature of the thing, and all the proofs, show that it was intended to be concealed.

Then as to the story of Sir Thomas Clarges, and the differences between the Duke and him, there is no proof of it; it is at most but an hear-say, testified by one witness.

That it was not subscribed by the Duke's counsel, as all his deeds usually were, it seems to me to be of no very great weight, when the draft appears under Sir Thomas Stringer's son's hand, interlined and corrected by himself, and Sir William Jones a witness to the execution, and present when it was completed; sure that can never signify any thing.

As to the other objection that was made, that the deed was not ingrossed according to the draft, and the variation is in so material a part, as to make the Duke master or not master of the estate, it should be considered, first, that upon view of the draft it is plain, words have been cut off, and there is a positive witness who swears that he twice ingrossed the deed by the draft; it is possible that a man may twice leave out the same words in ingrossing a deed by a draft; but that he should twice add the same words that were not in the draft, is very strange, and not easily to be believed.

Then say they, this is not the draft that was first perused and approved of by Sir William Jones: that is certainly such an objection as never was made before; and indeed it is likely there never was occasion to make such an objection till the last hearing; for it may be it was not cut till then: but pray let it be considered for whose interest it was to have this draft cut or altered from the engrossment: it is impossible it should be cut off for the interest of my Lord of Bath, by the objection that ariseth from it; for let any words in nature have been there, they could not have been of such disadvantage as they would have it to be:

however, be the alteration of the draft what it will, if it were not done by the defendants, nor was for their interest to be donē, nor done before the execution of the deed, it all signifies nothing.

But I think it is fit and proper here to say something to that notion, that where the counsel is surprised, that is a surprise upon the client: I take that to be a matter of very great consequence, and I fear it would shake most of the settlements of estates in England: and for that I would mention the case of Sir James Herbert, and the late Lord of Pembroke. There was a bill brought in this court to set aside the will of the elder brother, who was the last Earl of Pembroke but two; Sir James was heir at law, and the other was but half-brother.

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Sir James Herbert's and the Earl of Pembroke's case.

The Earl had taken a displeasure at his brother, and sent directions to Mr. Swanton to draw a will and settlement of his estate, and amongst other things orders, to be sure, that the brother should have no power over the estate to dispose of it; and because that in his grand-father's will there was such a settlement as he liked of, he sends him that: Swanton makes a will, and limits an estate to Sir Philip Herbert the brother for life, and the remainder to the heirs of his body; this will is brought by the counsel to the Earl, and read, and executed, and held to be good: yet this was a notorious surprise upon the counsel; for nothing is plainer than that the counsel had made a mistake, or knew not the law: he did not, at best, consider, that upon such a limitation, the law vests the whole estate-tail in him, and he may dispose of it.

Tenant for life, the remainder to the heirs of his body. the law vests the whole estate tail in him. and he may dispose of it.

It is plain he had not pursued the will of the grand-father; but yet when this cause came to be heard before my Lord North, when the will appeared to have been truly executed, the court declared it was a misfortune that they did not go to a better counsel: and it was sent to law to try whether it was the will of the Earl of Pembroke or no; and it being found to be the Earl's will, the bill was dismissed with costs.

Thus I have taken notice of what has been offered to prove the surprise; I would shortly mention on the other side, what hath been insisted upon to show that there was nothing like surprise, but all was done upon a very good ground, and pursuant to a settled full purpose, continued for so long a tract of time to the Duke's death.

First, say they, it doth appear there was a very near relation between my Lord Duke and my Lord of Bath; and that Duke George owned he owed his first setting-out in the world to the ancestors of my Lord of Bath: it doth plainly appear there was a most particular friendship and mutual confidence between them, in matters of the highest nature, and chiefest concern; nay, that this proceeded so far on my Lord of Bath's side, in Duke George's time, that he prevailed with King Charles the Second to promise, under the sign-manual, and recommended it to his successors, to create my Lord of Bath Duke of Albemarle, if there were a failure of issue by the Duke.

Then that this friendship did continue between Duke Christopher and my Lord of Bath, is plain beyond all controversy, for

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it began upon a very good foundation; that is, whereas the garter should have been given to the Earl of Bath, he prevailed to have it returned to the young Duke, and it continued so much all along, that there was nothing of moment relating to the Duke's affairs, in which the Earl was not mainly concerned; and all this is proved by a series of letters, continuing down from the death of Duke George, to the death of Duke Christopher.

In '74, he sends him word he had pursued his advice, and his advice should always be very prevalent with him.

In '75, he tells him, he expected to see him with great impatience, because he was not able to go on in the regulation of his family without his assistance and advice; that he had finished his will, and would make all more perfect when he came to him. It would seem his former will was trusted in my Lord's hands; and when that was returned or brought up, in a few days after his will of '75 is made; and by that all the estate, or the main of it, is given to my Lord of Bath. And it was the first will that he made, I think, after he came of age, and had any power to dispose of his estate in land; and thereby, as I said, he deviseth the bulk of it to my Lord of Bath: he always desired, as the will declares, that in case he had no issue, the Earl might succeed him in his honours and estate, as well out of true affection to him, as his nearest kinsman on his father's side, as out of due gratitude for the many acts of kindness and service done by the Earl, beyond all the rest of his kindred and friends, upon which he humbly desires his majesty to confer the dukedom upon him, and that the eldest son of the Earl, and so successively, the eldest son of the family, should be called Lord Monk, to preserve his name and honour in memory of his father and of himself. There cannot be words that express more kindness and respect, and intention of advantage, than are here used.

There was an attempt by proofs in this cause to shake the credit even of this very will; but when the counsel on that side came to speak to it, they could produce no proofs that would at all come near it. It is plain then, that at this time, no man could have more kindness for another, than the Duke had for the Earl.

In the year 1678, there appears the same sense in the Duke, of the Earl's friendship by his letters, and the obligations of gratitude he had to him; that he had no friend in whom he could confide but himself, and desiring him to come to assist him in the management of his affairs; that his kindness and friendship was never to be forgotten, without the highest ingratitude.

All this is a sort of evidence, against which there is no opposition to be made; so it is also continued to the year '80, when he sent him word of a servant's death, and desired him to secure his papers and accounts.

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Thus it stood to the time of making that settlement, and while the Duke and he were upon such terms with one another, it was no strange thing that he should make such a deed as this, and the manner both of preparing and executing it, seems far from having any thing of surprise in it.

Then the next thing that hath been urged, was, that this being To the second
a settlement under a power of revocation which he intended to head.
make use of, it was secreted and concealed from him, so that he
could not know what his power was; and several cases were put,
where a man in such circumstances, knowingly suffers a pur-
chaser to go on with his bargain, he shall not have any advan-
tage by such a concealed settlement, those cases were all admit-
ted to be good, and particularly that mentioned by Mr. Baron
Powel, and my Lord Chief Justice Treby, the case of Mr. Clare.
And I think truly I need go no further, than to say that there is
no resemblance between that case and this, that is, where a
purchaser is concerned, and the person that conceals the deed,
suffers the purchaser to proceed without giving him any notice.

If indeed there had been a full and clear proof, that the Duke
had a real intention to revoke this deed, if he could have known
what he was to do in order to it, and had been hindered by the
fraud and contrivance of any person concerned in it, in point of
advantage; and if by such concealment it was impossible for him
to know the true circumstances of his power, that would have
made a different consideration in a court of equity; but there is
no proof that these deeds were ever in the hands of my Lord of
Bath, till some little time before the Duke went beyond the sea,
when the Duke delivered them to him.

For as to Aleman's deposition, that was but a delivery upon
execution, and not a delivery for custody.

And my Lord of Bath in his answer says, he had not them till
then expressly; so that as far as that goeth, it is all the evidence
you have where the deed lay all the while; and his answer is
fortified in this, by what Mr. Courtney says, that my Lord told
him when he came to him, that the deed itself was in the hands of
the Duke; and he had received the draft from the Duke to
advise upon; and it is further verified by two material facts, by
the abstract that was taken about some two years before by Sir
Thomas Stringer, and by what is admitted on all hands, was by
my Lord of Bath delivered up when the will of '87 was prepar-
ing; and that the will of '75, and deed, being produced together
under the Duke's seal, after his death, it is to be taken that both
together were put under the cover, and sealed up by the Duke,
and delivered to my Lord of Bath, as he himself says in his an-
swer. There being then so much ground to believe that the deed
was in the Duke's own hands, what obligation should there be
supposed to lie upon my Lord of Bath to make any mention of it
to him? It was always intended to be a private thing, that is
plain; there is no proof what the purposes of the Duke were in
making the will; the purport and effect of the thing speaks
itself. [123]

But my Lord of Bath says, that upon the selling of Dalby and
Broughton to my Lord Jefferies, he did give the Dutchess a cau-
tion not to be so earnest for finishing the bargain, for she might
be a looser by it; which could mean nothing, but that she had an
interest in it by this deed.

As to the objection, that my Lord of Bath stood by and saw

A voluntary settlement of no force against a purchaser without notice.

Where two persons claim by two voluntary settlements, the matters stand upon an equal foot.

No decree can be made against a man's answer upon the proof of one witness.

that purchase made, and gave no notice of this deed to the purchaser: I confess, had my Lord of Bath set up this deed against, and to overthrow that purchase, that would have brought it up to the case of *Wraw and Ford*; but every body knoweth, that a bare voluntary settlement is of no force against a purchaser without notice; and as to the leases and grants of annuities, there is no proof that ever my Lord of Bath knew of them.

Then it was objected, that though it go not so far as a purposed concealment, yet the thing was out of mind, and the Duke continuing owner of the estate, and acting as owner, though not with all the circumstances required, those acts done by him as owner, are to be supported in a court of equity; this seems a hard demand, for a voluntary devisee to crave relief against a prior settlement with a power of revocation; because he that made that settlement had forgotten it; there is no precedent to warrant a decree of that nature, nor is there any pretence of reason for it; for betwixt two persons, each of which claim by a voluntary settlement, the matter stands upon an equal foot, and there is no possibility of an equitable consideration to assist the one against the other.

And if there were any ground for it, as a notion, there were no room for any such notion as to the proof in this case; for it is founded upon a supposition that the Duke of Albemarle had forgotten the settlement, of which there is no proof, but only an argumentative one, drawn from his disposing of his estate another way and manner. But that he had not forgotten it, besides the answer of Mr. Grenville and Sir Walter Clarges, there are other things to be said:

And as to their answer, I take it no decree can be made against a man's answer upon the proof of one witness; why then should a decree be expected against a man's answer where there is no proof to the contrary at all?

Sir Walter Clarges (upon somewhat that had been told him of the Duke's intentions towards him by his last will) as should seem, took the liberty to complain to the Duke, and seemed much discomposed; but the Duke bid him not be concerned at what Stringer said, for he had otherwise better provided for him; now there is no other provision but what is by this deed.

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Mr. Grenville addressed himself to the Duke, to thank him for what kindness (Sir Thomas Stringer acquainted him) he had shewn him in his will; but the Duke replied with some reflection upon Sir Thomas Stringer, (who pretended to have been very instrumental in it) that he had never moved him in it, but that he had taken care of him, and his brother would tell him wherein; and if he would, he might tell his brother he said so. And he swears he did go to his brother, my Lord of Bath, who told him the Duke had indeed provided for him, and settled a part of his estate upon him; but that if the Duke had not allowed him so to do by sending him to him, he would not have told him of it.

All this is a full proof, that the Duke had not forgotten this deed at that time; but it cannot be believed, that the Duke had

ever forgotten this deed, without disbelieving several acts that have been substantially proved to be done by him ; as when upon my Lord Lansdown's marriage, his letters do particularly take notice of a general interest he had in him, and seems expressly to refer to this very deed, as being so much concerned in his good or ill fortune, as my Lord of Bath himself very well knew ; and congratulating the match with my Lord treasurer's daughter ; he goes on to desire, that as he had taken care to marry him well, so he would have great regard to his education ; which he did mind him of, remembering still, that he was most concerned in him, of any one, except himself, as he very well knew. This could refer to nothing but some settlement of his estate, and none appears but this.

There seems to have been some attempt to interrupt this friendship and amicable correspondence between the Duke and the Earl ; for by a letter dated, as I take it, 31st January, '81, the Duke says, his kindness and friendship shall always be the same ; and all the malicious endeavours of ill people shall not be able to break the link between them ; so that it should seem, there were malicious endeavours used to sow differences between those noble persons ; but by whom, is not apparent in the proof.

But still there is a continued series of kind letters between them, which goeth on even to the time of making the last will in '87, as full of gratitude (all the Duke's letters, great numbers of which were produced) as can be, for his continued services and kindness ; nay, down to the time of his going to Jamaica, and while he was there. Now it looks to me very strange, that the Duke should all this while be receiving obligations, and owning them from my Lord of Bath, and yet must be supposed to have forgotten what he had done in acknowledgment and recompense of these services. Then there is besides all this, the positive testimony of Mr. Crofts and his wife, both swearing particular declarations from the Duke's own mouth, which can have relation to nothing but this deed.

There is indeed one thing that is urged as a strong argument, the Duke intended to alter this settlement, that is his taking such formal steps in preparing and drawing this last will, his advising with my Lord Chief Justice Pollexfen, and so much solemnity as was used in having the parts of it ingrossed and delivered with such ceremony to the several hands. It is, they say, hard to imagine he would do all this with a deliberate intent that it should all signify nothing as to his real estate, and so quit the world with a great deal of pageantry and ceremony to no purpose.

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Now it must be owned, that it doth seem a strange part in the Duke, and the world must be surprised at it ; for it is impossible to make the Duke's actings of a piece, and reconcile such contradictions ; he cannot indeed be cleared from prevarication ; he did certainly intend to deceive the Dutchess, or my Lord of Bath : it is most evident he did keep my Lord of Bath in hand, that he should have his estate ; for the testimony of Mr. Prideaux, and other witnesses, concerning the Duke's declaration of his intend-

Bath and Mountague's Case.

ing to settle, and having settled his estate upon him, we find by this deed his estate is so actually settled, and that mind continued till '81; and it appears by letters, as well before as since, that Duke Christopher intrusted him in all his affairs of consequence, acted not in any thing but with his assistance, continually made use of his friendship at court, to the time of his death: when he was dissatisfied with any of his servants, my Lord of Bath was the man that must settle the matter; when he was to purchase, my Lord of Bath must buy for him; when he was to sell, my Lord of Bath was to transact the matter: when he wanted money, my Lord was to procure it for him; when he was in danger of losing money, my Lord is applied unto to prevent it. All this appears by the several letters that have been read and produced. When he was gone to Jamaica, and any request at court, my Lord's interest was that which he relied upon; my Lord of Bath was the single trustee to be applied to chiefly in what concerned the estate, the keys of the evidence-room were to be deposited with him, as being principally concerned if he should miscarry.

Now it must be confessed a man may do as much as all this comes to, and make use of another man's friendship, and not design to give him his estate, when he had once firmly settled it so, and repeated his assurance of kindness, and continued to make profession of kindness all along to the time of his death, and went on to make use of his service, because he thought he might freely command the service of one who expected to have such advantages from him; yet then I do not see but that it must be admitted, that he did deliberately design to impose upon my Lord of Bath; or if he did not, he did intend to impose upon my Lady Dutchess. Now be it which it will, I do think he is not to be excused in reference to the point of honour, as to the request made to the King for the Earl of Bath, and in pursuance of Duke George his desire, who engaged the late King to promise under his sign-manual, and he hath made the same kind of request for Mr. Monk.

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Now upon the whole matter, whether this will of 1687 was made to free him from some importunities in his family, is a great question. There are some proofs in the case that greatly look that way: it is plain he did not execute it for several months after it was prepared and drawn; and when it was published, it was obtained with great importunity against his inclination at that time; and there doth not appear any intention that it should revoke this settlement, but on the contrary, it should seem he did not intend so; for there are no witnesses called to the will, but the same that came with Stringer from Newcastle-House to that purpose: but whether he did intend it should take effect, as to the personal estate only, or to delude my Lord of Bath, which way his honour is best saved, is not at all to our purpose to consider, upon the case before us in judgment; though I must say, take it one way or the other, he seems to blame, and to have dealt in some sort double.

The 3d head.

The next thing insisted upon is, that this deed is revoked in

equity by his will; and though the power be not pursued in all the circumstances, yet his intention appearing to make this different disposition of his estate, a court of equity should supply that defect.

Now I take it for granted, that a power of revocation shall not be carried farther in a court of equity than the law will carry it; the law hath been liberal in expounding powers of revocation favourably; and where the law expounds a thing according to an equitable constitution, there is no reason for equity to extend it farther.

A power of revocation shall not extend farther in equity than the law will carry it.

Where there appear to be other equitable considerations, it may have another judgment; but if it stands without any mixture of other considerations, I think it would be very hard to break through a settlement, especially so solemnly made, that he thought fit to restrain himself from altering it, without the assistance of so many noble persons, whenever he would make use of the power thereby reserved to him; I say, it would be a very strange thing for a court of equity, without the mixture of any other considerations, to assist another voluntary conveyance against this.

The case of Arundel and Philpot is a full authority in this case, and it has been so often repeated, that I need not mention it any farther.

As to what was insisted upon by some about the revocation, being completed as to the number of witnesses, by the publication in Jamaica, and the impossibility of having any peers there; I must confess, had the Duke in Jamaica had an express deliberate intention and purpose to revoke any acts to testify it, and gone as far in pursuance of the circumstances as his condition in those parts would admit, that might have come in within that foundation of equity (to wit) accident.

But I think there is no ground of proof of any such intention or action; for the proof amounts to no more than this: the Duke, to prevent any troublesome applications to him, shut up himself in his room, and those that came to him were to come in at the window; and a strong box, in which his papers were, standing under the window, by frequent treading upon it, he had a suspicion that there had been some attempts to force and open it; whereupon he calls for the box, to open it, and out of it takes several papers, which he read, or gave to Dr. Sloan to read, several letters, as I remember, and afterwards he took up a sealed packet, and said to the doctor, this is my will, and put it down again: is this any manner of proof in the world, that this act was done *animo testandi*? Much less is it any proof that there was any notice taken at this time of this settlement, or that he would avoid it.

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I would say something to that other point, that this being a deed made to confirm and corroborate the will of '75, is but ancillary to the will, and depends upon it, and is to stand or fall with it, and upon the revocation of that will did fall with it.

The 4th head.

This is an objection wholly inconsistent with the other arguments that are used against this deed, that it was by surprise; for by those arguments they would destroy the deed, as inconsistent

with the will; but now the argument is turned the other way. But my Lord Chief Justice Holt has so fully and clearly answered that matter, that I shall not need to trouble you with saying any more in it: the cases cited about it are in no sort applicable to this case.

The last thing insisted upon was, supposing the deed to stand good, yet there being a general trust raised in it to pay the legacies in the will, my Lord of Bath was no more than a trustee, and the Duke continued master of the estate; and he who had such a general power to charge the land, might do it to the full value, and then consequently might dispose of the land too.

A trust the proper subject of a court of equity,

Now this point of trust is the proper subject of a court of equity; but to expound a deed which is made on purpose to prevent a descent upon the heir, and then to make a general resulting trust to let the heir in, is such a construction as will apparently contradict itself and the deed. But that will fall out to be a point that comes to be considered hereafter, how far this may be a trust in my Lord of Bath to answer legacies or debts in case the personal estate should fall short; it is not properly considerable now.

Conclusion upon the sole point.

The only point that was spoken to by the counsel, and left for the judgment of the court, was this: whether in this case here were sufficient matter for a court of equity to interpose so far as to set aside or impeach this deed of '81. Now as to that matter, I think I have the concurrence of my Lords the judges in it; and I am of opinion, that there doth not appear sufficient ground upon this case for a court of equity to do any such thing; therefore I declare my judgment:

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Decree.

That as far as my Lord Mountague, and my Lady Dutchess, and Mr. Monk, their bills pray, that the court will interpose to set aside this deed, so far their bills ought to be dismissed. As to any other matters that arise in the case, I suppose there will be time taken to speak to them: but this is the only matter in judgment before us at present.

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IN CUR. CANCEL.

Lord Chancellor SOMERS,
Lord Chief Justice HOLT, and
Lord Chief Justice TREBY.

*Bertie & Uz. cont. Dom. Faulkland. Term Hil. 9
Wil. III.*

Lord Chief Justice Holt's argument.

The case was: Mr. Carie being seised in fee of the manors and lands in question, upon the 10th of September, 1685, makes his will, and thereby deviseth the said estate to trustees therein named, and their heirs, and directs the trust thereof to be to the trustees and their heirs in trust for Mrs. Willoughby (who was

also heir at law to Mr. Carie) for her life, in case within three years after his death she lawfully married the Lord Guilford; and in case the said marriage should take effect to the eldest and other sons of Mrs. Willoughby by the Lord Guilford in tail-male; but if no such issue were had, or in case the marriage should not take effect within three years after the death of Mr. Carie, then the trust was devised over to the Lord Faulkland. After, the 20th of the same month, Mr. Carie reciting the request to Mrs. Willoughby, makes a codicil, and thereby declares it to be his will, that if the said marriage between the Lord Guilford and Mrs. Willoughby took effect before the age of consent of both or either of them, it should be of no avail or signification, unless it were confirmed by both parties at their age of consent. After, in October following, Mr. Carie died, and divers transactions were between the guardians of the Lord Guilford and Mrs. Willoughby and her friends, about the marriage, who insisted upon terms, and a settlement of a proportion of the Lord Guilford's estate upon her. But the Lord Guilford did never make his applications to her about it, but the three years after Mr. Carie's death did expire. Several proposals, within the three years, were indeed made by the friends of Mrs. Willoughby to the Lord Guilford's guardians, but not accepted of by the guardians of the Lord Guilford; and the three years after Mr. Carie's death being elapsed, the young lady married the plaintiff.

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The question was, whether this appearing to be the case, and no default or neglect appearing in Mrs. Willoughby, who, as was urged, pressed the marriage as far as the modesty of her sex would allow of, she shall not have the aid of a court of equity?

And this doth arise upon the construction of the will; divers things indeed were mentioned by counsel, and proof was made of divers discourses, and letters had passed by Mr. Carie, expressing a kindness to Mrs. Bertie, (then Mrs. Willoughby) his niece. But all those, and other the evidences that were produced, were to be rejected; no notice being taken of them in the bill to which they ought to be confined. Besides, such matters, neither before nor since the statute of frauds and perjuries, would control the will; or if they would, yet the will and codicil being the last act of his life, doth repeal all his other acts.

He thought, upon consideration of the will, there could be no relief:

First, Because the estate was given to Mrs. Willoughby upon a condition precedent, which was, that if she should be married to the Lord Guilford within the time appointed, it is given to her; and such is the nature of a condition precedent in point of law, that no action interposing can be ground to relieve upon, if it be not performed. So that being a condition precedent, although the Lord Guilford had died within the three years, and so the condition had become impossible by the act of God, it could not have helped the lady. It will not be easy in a court of equity to show any precedent of a relief in case of conditions precedent, as often happens in cases of conditions subsequent; which not being favoured, because they go in defeasance of estates, this

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court may relieve if it be performed in the substantial part, though some of the circumstances be not pursued.

2. The second reason is, because it is not only so in point of law, but also by the express declaration of Mr. Carie, the testator. It was his purpose that the marriage should take effect, for he doth not give her the estate upon any act in her own power. It was limited to her in case the marriage took effect, to which there was to be the consent of the Lord Guilford, as well as of the lady; the marriage was appointed to be within such a time, or else the estate to go over to the Lord Faulkland; besides the addition of the codicil, although they should marry within age; yet if both parties did not confirm the marriage at their respective ages of consent, it was the same thing, and the lady to be excluded.

3. The third reason is, because it both appear by the will, that the actual marriage of the Lord Guilford to the young lady, Mrs. Willoughby, was the only consideration of the gift of the estate; for he had a great kindness for the Lord Guilford, and doth not give it to any heir that the lady should have, but only to her issue-male by the Lord Guilford.

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It was urged, that Mrs. Willoughby was heir at law, and therefore every thing should be construed beneficial to her; to which it may be confessed, that heirs at law are much favoured, if the words in a will are ambiguous. But that rule shall not extend to defeat an interest well vested, when the words of the will are very express, and the construction can admit of no doubt.

It was also insisted by the plaintiff's counsel, that if the lady should by the will have an estate for her life, a decree should also be in favour of her issue by the plaintiff, Mr. Bertie; but for that there can be no pretence, it being so very contradictory to the will, and the intention of Mr. Carie.

Then it is evident, that as the testator designed a kindness to the Lord Faulkland, so he had a respect to his own name, and more inclined to support that than the lady's interest; for had he had any great respect to the lady, he would not have put such hard terms upon her. He hath not given it to her heirs-male in general, but such only as she should have by the Lord Guilford; he only gives her a conditional estate for life, when otherwise after his death she would have had the absolute inheritance; and so the will is so far from being to her advantage, as to amount to a disinheritance of her who was the heir at law to Mr. Carie, the testator.

This being the state of the case, what shall a court of equity do? Shall it give her the estate, though married to another person? This is not within the words or equity of the will, but in express contradiction to both of them. If the estate indeed be upon a subsequent condition, equity may interpose, where the substance is performed, though not in every matter literally pursued; but where it is in no part performed, as in this case, it can never help.

There was a case cited between the substance whereof was, that R. by will devised an estate to H. P. upon condition that he should convey two-thirds of it over to another;

which if he did not do, the whole was to go over to a third person. He did not exactly convey over these two-thirds, but did convey what was equal in value to the two-thirds; and allowed good, because 1000*l.* is as good in one place as in another; but had it not been performed, and the value of the two-thirds conveyed, it must have amounted to a destruction of the estate.

The case of Fry and Porter in this court, is much stronger than this case: for there the Lord Newport devised Newport-House to his lady for life, and after to his grandchild Ann Knowles, and to the heirs of her body, upon the condition that she married with the consent of his wife, and the Earls of Warwick and Manchester, or the major part of them; but if she married without such consent, or died without issue, then he gave it to George Porter. After the deviser died, the young lady (not having notice of the will) married without the consent of any of the trustees. The estate was forfeited in law; and after, in this court, by the advice of two justices, and upon a great debate, it was held, she could have no relief; although she was an infant, and had no notice, and consequently did not know that she was under the obligation of having the advice and consent of the trustees; but yet she lost her estate, and could not have any relief. That cannot be pretended in this case; for this lady was acquainted with it, she had notice, and was willing to comply with the marriage. 1 Mod. Rep. 300.

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The case also of my Lord Bath and Montague was cited, to show him the terms on a power of revocation ought to be pursued; for those persons that derive an estate from another, must take it upon those terms upon which it is conveyed.

It was objected, that this was a trust, and this court may qualify a trust, and dispose of it in a different manner than of estates. To which it was answered, that this court hath as great a power upon an estate as upon a trust, and may as well transfer an estate as it may a trust. It is the ground of equity, in one case or the other, that entitles this court to its jurisdiction.

This lady was under this farther difficulty, that if three years were elapsed, and the marriage between her and the Lord Guilford should take effect, that yet there would be no room for any relief; but that case is not this neither; for here she married when there was a possibility of marrying the Lord Guilford, and so hath destroyed her equity quite, by disabling herself; for once disabled, and ever so. So that if it should ever happen to be a match between this lady and the Lord Guilford, it could never secure the estate to her. Infancy will not secure her; for where infants take by will, they are bound as strictly as other persons.

It was also insisted upon, that the lady was managed by her trustees; and if the trustees insisted upon terms, it would be hard that she, that ought to be governed by her trustees, should lose the benefit of the estate by their means. But how can it be helped? The trustees did it indeed out of respect to the lady, to get the best terms they could. But they meddled in a matter they had nothing to do with; they were trustees of the estate, but not of the person, and had no authority to obstruct the marriage.

Besides, Mr. Carie did not intend there should be any settlement; he left her a fair fortune, so as not to stand in need of any jointure. And when he did not expect such a provision should be made, how comes it to pass that the trustees should interpose? It was unreasonable for the trustees to meddle in it: for the marriage was designed during the minority of the Lord Guilford; and the trustees of that Lord were not obliged to charge their own estate, and the Lord Guilford himself had no power to make any settlement during his minority.

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Then as to the orders that were obtained heretofore in this court, they were not at the prosecution of the Lord Faulkland, who was a perfect stranger to all these proceedings, and therefore they can be no injury to his title; wherefore he concluded, that the plaintiff's bill ought to be dismissed.

And of such opinion was the Lord Chief Justice Treby, who argued the day before.

That it was plain upon the devising words of the will, that by the intent of Mr. Carie, the plaintiff's lady was to take nothing, but upon a condition precedent: the estate was limited to the trustees for three years, and the profits were to be applied for several purposes during that time: it was contingent who should take at the end of the three years; if my lady married the Lord Guilford, within the three years, she was to take for life, and after her issue-male by the Lord Guilford; but if she did not marry within three years after the devisor's death, it was to rest in the Lord Faulkland.

It was said by the defendant's counsel, that the words did not imply a condition precedent: but if they were to advise how to make a condition precedent, they could not frame one stronger than the words set down.

To say, that if the lady were lawfully married, is the same thing as if she were willing to be married, is a strange construction, and a manifest violence to the plainest words.

It is not possible that any other part of the will can make a different construction from the devising words.

Nothing can be inferred from her being heir at law; for the frame of the will is such, as to exclude her from claiming as heir at law; for though she complied with the terms of the will, she was to have no more than an estate for life.

As to the intention of Mr. Carie, in expressions precedent, that can make nothing in the case; for he might change his mind as often as he pleased.

Some letters of Mr. Carie to the lady were objected, which, had they been read or proved, would have been of little use, because it is not pretended that he was at all after surprised in the making or penning of the will.

The precedent intention was as fully proved in Fry and Porter's case, as in this; and yet there it proved ineffectual.

It was said, that it was not the testator's design to exclude the young lady, without her default. It is most evident that it was his intent to disinherit her; for he gave her only an estate for life, by will, in case she did comply with the terms of it; but nothing, if she did not.

Upon consideration of the words of the will, he had as great a consideration to the Lord Guilford as for this lady ; the remainder was limited to the issue of the lady by the Lord Guilford.

Then whether it ought to make a difference, that the interest disposed of by Mr. Carie was not a legal interest ; nothing is surely better settled in this court. Then rules of property, if the same words are used, cannot have different significations in several courts, although courts of equity may and do relieve against points of law, in case equitable considerations do arise thereupon.

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It was insisted, that although it were admitted that the condition imposed was not literally performed, yet if it were complied with in equity, it would suffice ; and that it was so, they urged, that if the lady did all in her part to be performed, she should not lose the estate ; that this was the favourable case of infancy, and the case of forfeiture ; that the lady made such advancements as the modesty of her sex would admit of ; that she sent proposals, such as were condescending on her part, to consummate the marriage, and stayed till the Lord Guilford came to his age of consent before she married.

As to the latter part of the case, he said, he did not doubt but that if the defendant, the Lord Faulkland, who was to have the advantage of her not marrying, had by any underhand acts of his put a stop to the intended marriage, there equity would have interposed for the benefit of the lady : but whether any other cause whatsoever, that did not arise from the act of those that were to take advantage by it, would be sufficient to excuse a non-performance, would be hard to maintain. If the Lord Guilford had died within the time, or refused to marry her, she had not been in a better case : so if he had married her, and had after dissented at the age of consent, though in such cases it would be hard, it was Mr. Carie's disposition, and cannot be helped. This court cannot make a new will ; but a man that hath an estate hath the full power over it ; and Mr. Carie might annex what conditions he pleased to his own estate.

Besides, the lady and her trustees are not wholly to be excused ; for upon the 16th of December, '85, the trustees of the Lord Guilford desired a present marriage ; to which she answered in writing : to her the proposals were made, and the answer, that she, when he attained the age of consent, would give her answer, was a refusal for that time.

Then further steps were taken : the lady sent her proposals in to the Lord Guilford ; to which his guardians answered, that he was ready to consummate the match, but could not enter into the consideration of the proposals made.

The next step was made by the guardians of the Lord Guilford, signifying, that he had arrived to the age of fourteen, and was ready to perform the marriage : the answer to which, in writing, was, that she would first expect her proposals to be complied with.

The father of the Lord Guilford died before Mr. Carie, the testator ; so that Mr. Carie might have informed himself of the Lord Guilford's estate, how it was left, and whether any settle-

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ment might be conveniently made by him upon the match ; but the testator did not impose any terms, or require any thing to be done by that Lord, but what the should marry the young lady. Mr. Carie knew the age of both the parties, and restrained the marriage to the three years after his death ; at which time no settlement could be made, because of the infancy of the Lord Guilford.

Infancy can be no excuse for the non-performance of the condition, because it is plain the condition was to be performed when an infant, or else it could never have been performed. In Fry and Porter's case, the lady was an infant, and is a harder case than this, because there was no notice of the will at all : but where an infant is bound to perform a condition, he is bound to it as strictly as other persons of full age.

As to the proposals, in behalf of the lady, made,

They were to put the young Lord in a worse case than was designed by the will of Mr. Carie.

Besides that, the Lord Guilford was not to take any estate himself by that will, only the issue-male he should have by Mrs. Wilmoughby.

Then if the Lord Guilford might have gone farther than he did, if he had pleased ; yet that is not to be the measure of justice in case he went as far as he was obliged to do.

If the proposals on the part of the young lady were never so reasonable, and the Lord's guardians were very unreasonable, that doth not relate to the person in remainder, without any default of the Lord Faulkland, the trust is vested in him ; and what equity is there to take it from him, who is no confederate nor party to any contrivance to defeat the lady ? There was no suit at all against him ; he was an infant, and not privy to any ill practice : the condition was not performed, and thereupon his interest commenced.

The case of the Lord Salisbury and Bennet went upon different grounds from this case, because there was no disposition of the money over ; and then the rule admits it shall be only taken *in terrorem*. The sum of money in the case mentioned, was to be divided amongst the daughters, if they married with consent of their two aunts, under their hands and seals : the one of the aunts agreed to the marriage of one of the daughters, under hand and seal ; the other aunt was attended about it, but hesitated upon the matter, and told the intended husband, that she was going out of town, and advised him to pursue the design ; by which she did not absolutely refuse him, but until she came to town.

Where such things as are to be performed, may be valued, as conveying an estate, or paying money, there this court doth give relief ; because it can make amends for want of time and other circumstances : so in case of conditions subsequent, equitable considerations may govern ; but otherwise, in case of conditions precedent, where nothing ever vested. If conditions subsequent, annexed to estates, become impossible by the act of God, the party shall have the estate ; but otherwise, in case of conditions antecedent.

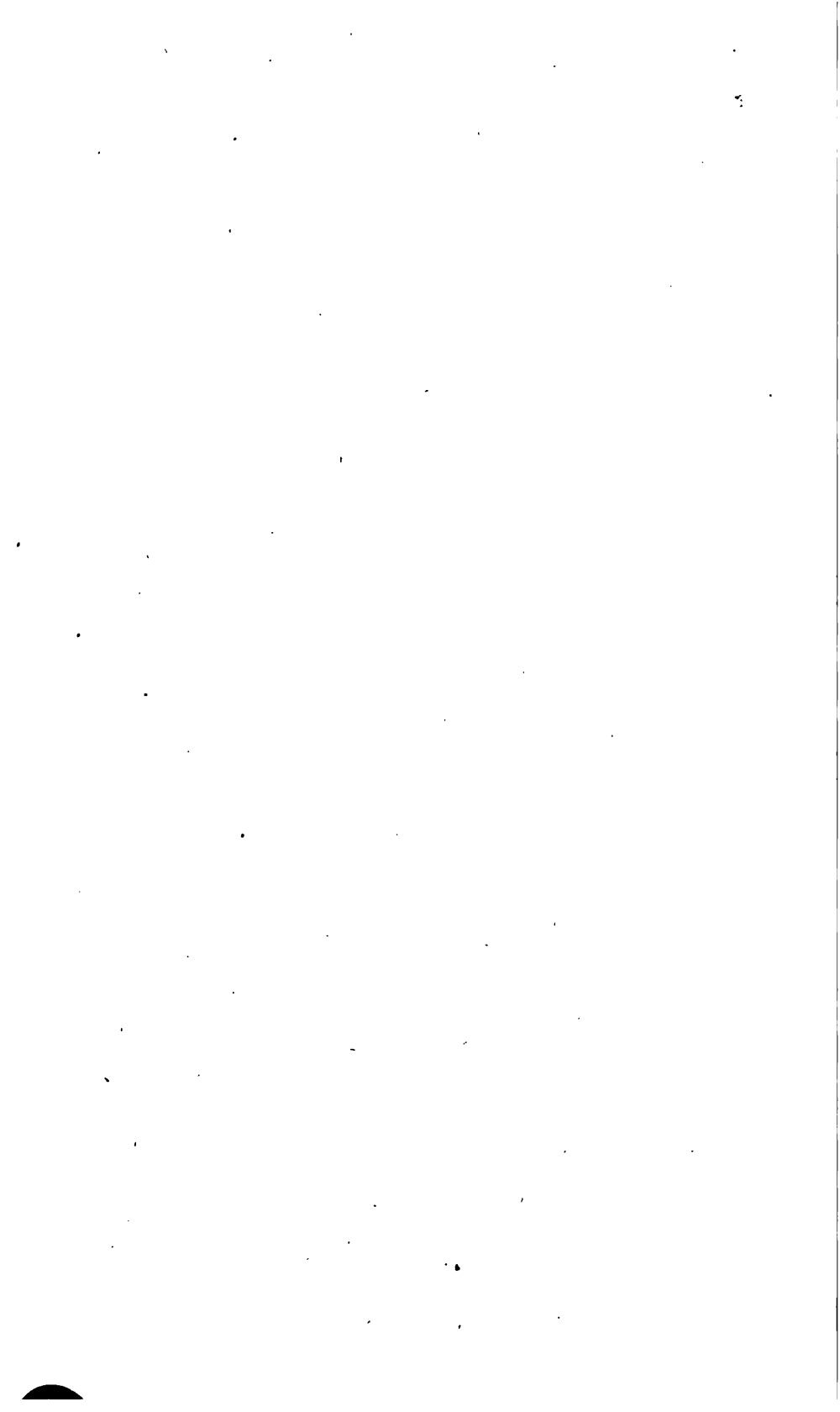
Whereas it was pretended, that the marriage of the lady to Mr. Bertie should be an equivalent to her marriage with the Lord Guilford; that cannot be warranted: for though both the persons were of equal honour and estate, yet the intent of Mr. Carie is to be considered, who had an eye to the Lord Guilford: and therefore this is not to be resembled to the conveyance of an estate, or payment of money, where such equivalents may be allowed; and Mr. Bertie's counsel were in this bill at a loss what conveyance of the estate to ask.

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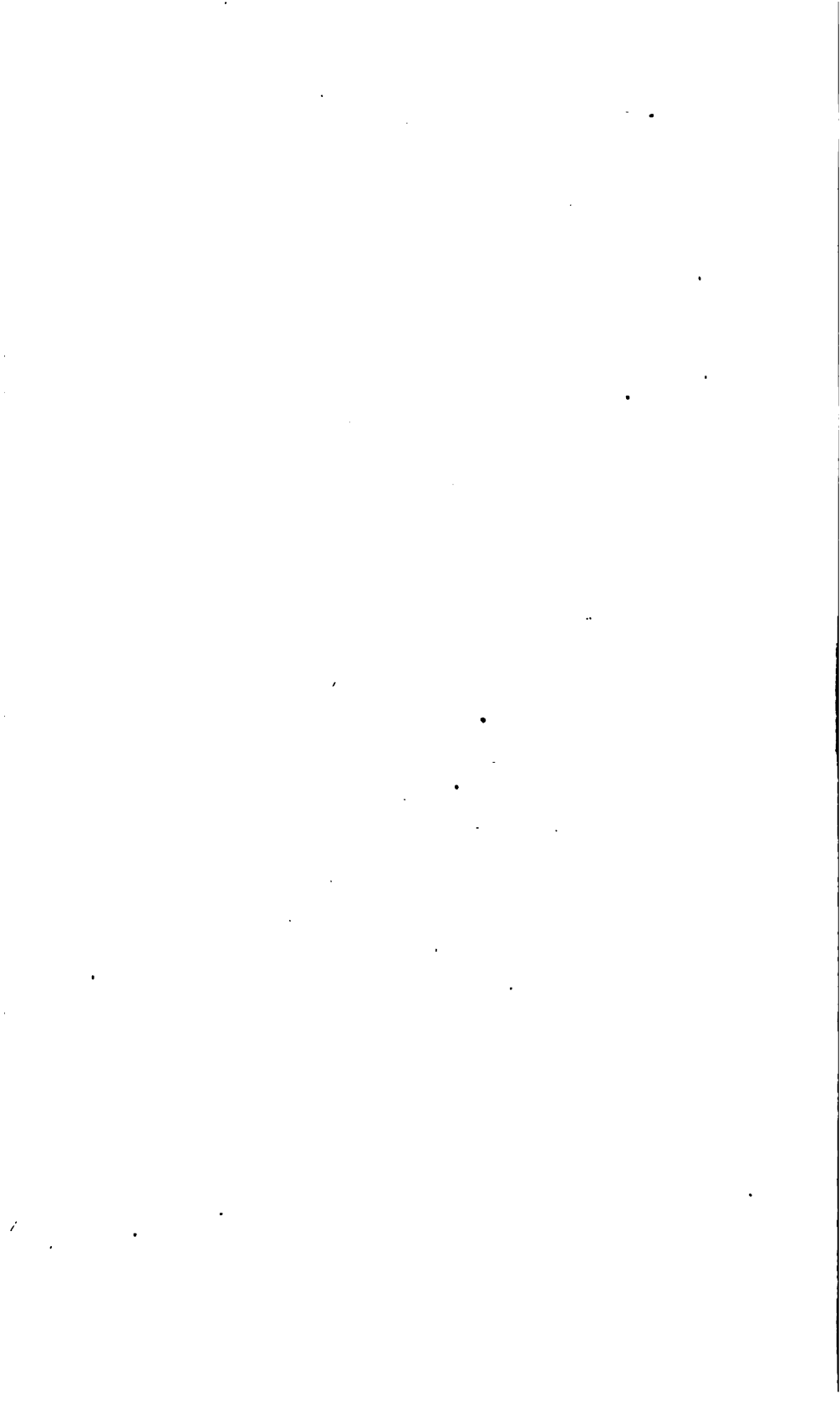
Then the last thing to be considered in the case, was, how far the proceedings in Chancery might influence it. It was urged, that several orders had been made in this court in opposition to the proposals of the guardians of the Lord Guilford by the Lord Chancellor Jefferies; that no marriage should be had, unless a compliance was first made to the lady's offers; that the will directs the account to be taken in Chancery; and that this court hath the care and ordering of infants. To which he answered, that true it was, that several things were trusted with this court; it hath jurisdiction of infants, idiots, and charitable uses. Several statutes have altered matters in the power of this court, and so far they are altered, and no farther. The courts of wards and livery, with respect to infants and idiots, were taken out of this court, and transferred in some measure to that; but by the dissolution of that court, returns to this again: that guardians are appointed by writ for infants, and one or more guardians jointly: that the law is favourable to infants; no decree of this court shall be had against them, but what they may show cause against when they come of age. This court will make strangers accountable to infants, in case they take the profits of their estate; and though a particular person be appointed to take an account, this court can direct it shall be taken before the court. This court, upon application made to it by guardians, hath settled the maintenance of infants; but in case of infants, this court would never dispense with a condition precedent, or take away the right of one infant (as the Lord Faulkland was) and give it to another, or can it ever bind those persons that were never parties to the suit.

The orders obtained of the Lord Chancellor Jefferies, were upon misinformation, and false suggestions: they told him, that good terms might be had for the lady, in case they were insisted upon: it was suggested, that she was ill provided for, and the end of the petition did not agree with the suggestions of it; that therefore the Lord Chancellor not being informed of the true circumstances of the fact, the orders grounded upon such false suggestions could not be at all binding.

Wherefore he decreed that the plaintiff's bill should stand dismissed.









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